Hilary Term
[2013] UKSC 5
On appeal from: [2012] EWCA Civ 808

JUDGMENT

VTB Capital plc (Appellant) *v* Nutritek International Corp and others (Respondents)

before

Lord Neuberger, President
Lord Mance
Lord Clarke
Lord Wilson
Lord Reed

JUDGMENT GIVEN ON

6 February 2013

Heard on 12, 13 and 14 November 2012

Appellant
Mark Howard QC
Paul McGrath QC
Iain Pester
Tony Singla
(Instructed by Herbert Smith Freehills LLP)

2nd Respondent
Michael Lazarus
Christopher Burdin

(Instructed by SJ Berwin LLP (up to 1st December 2012) and Fried, Frank, Harris, Shriver & Jacobson (London) LLP (from 1st December 2012))

4th Respondent
Mark Hapgood QC
Stephen Rubin QC
James McClelland
(Instructed by by SJ Berwin LLP (up to 1st December 2012) and Fried, Frank, Harris, Shriver & Jacobson (London) LLP (from 1st December 2012))

LORD MANCE

Introduction

1. The appellant, VTB Capital plc ("VTB"), is incorporated and registered, and authorised and regulated as a bank, in England. It is majority-owned by JSC VTB Bank ("VTB Moscow"), a state-owned bank based in Moscow. The first, second and fourth respondents are, respectively, Nutritek International Corp ("Nutritek"), Marshall Capital Holdings Ltd ("Marcap BVI"), both British Virgin Islands companies, and Mr Konstantin Malofeev, a Russian businessman resident in Moscow said to be the ultimate owner and controller of both, as well as of the third respondent, Marshall Capital LLC ("Marcap Moscow"), a Russian company which has not been served.

2. The present case arises from a Facility Agreement dated 23 November 2007 ("the Facility Agreement") entered into between VTB and a Russian company, Russagroprom LLC ("RAP"), under which VTB advanced some US$225,050,000 to RAP. The advance was primarily to enable RAP to buy six Russian dairy companies and three associated companies ("the dairy companies") from Nutritek. After making three interest payments (and no payments of capital), RAP defaulted on the loan in November 2008. VTB believes the security provided for the loan to be worth only in the region of US$32m to US$40m.

3. VTB's case is that it was induced in London to enter into the Facility Agreement, and an accompanying interest rate swap agreement, by misrepresentations made by Nutritek, for which the other respondents are jointly and severally liable. The misrepresentations alleged are, first, that RAP and Nutritek were not under common control, and second, that the value of the dairy companies was much greater than they were in fact worth. VTB's case is that the misrepresentations were fraudulent.

4. In order to bring proceedings in tort in England against any of the respondents, VTB required permission to effect service on them out of the jurisdiction. Permission was obtained from Master Winegarten on 11 May 2011. The first, second and fourth respondents were served, and applied to set aside the service. In response, VTB applied for leave to amend its particulars of claim to add a contractual claim, seeking to hold the respondents liable for breach of the Facility Agreement and interest rate swap, on the basis that RAP's corporate veil could in the circumstances be pierced and the respondents held liable as persons behind the borrowing. The respondents' application to set aside succeeded and

VTB's application to amend failed before Arnold J, and the Court of Appeal upheld his decision on both points, albeit by reasoning in some respects different.

5. As to service out, it is common ground, in the light of the decisions below, that VTB has a serious issue to be tried in tort against each of the respondents, and a good arguable case that its tort claims fall within CPR Part 6, PD 6B, para 3.1(9)(a), on the basis that they led to VTB sustaining damage within the jurisdiction. But both courts below held that VTB failed to show that England was clearly or distinctly the appropriate forum for resolution of VTB's tort claims. As to piercing the corporate veil, both courts have held that, although such a principle exists, no basis exists in the present circumstances for applying it to hold the respondents liable on a Facility Agreement or interest rate swap, into which they are alleged to have induced VTB to enter by deceit.

6. VTB now appeals by permission of the Supreme Court on both points, which I will consider in turn.

Appropriate forum - the basis of the claims

7. Both the alleged misrepresentations on which VTB relies originated in Russia, but they reached VTB in London (very probably via VTB Moscow), and were relied upon by VTB there when it gave formal agreement to the Facility Agreement and interest rate swap there. Further, VTB sustained its loss by disbursing money in and from London, although, as will appear, it was in fact covered by VTB Moscow against any loss which it might otherwise make on the loan. In these circumstances, I address the question of the appropriate forum on the basis that, contrary to the conclusion of the judge and Court of Appeal, the law governing the alleged tort of deceit is English rather than Russian law. In summary, this is because England is the place where the events constituting the tort occurred, within the meaning of section 11(1) of the Private International Law (Miscellaneous Provisions) Act 1995 and the respondents have not shown under section 12 that the significance of the factors connecting the tort with Russia is such that it is substantially more appropriate for Russian rather than English law to apply to determine the issues arising in this case. Whether the same applies to the alleged tort of conspiracy was not the focus of detailed submissions on this appeal and appears to me more doubtful. The conspiracy was to commit the deceit, but since both are based on a common design allegedly formed in Russia, that is a point that cuts both ways. I am however content to proceed on the basis that the conspiracy was, like the deceit, governed by English law, since ultimately in my view it makes no difference to the result.

8. It is relevant in the light of the above to examine the pleaded basis for the allegations of deceit and conspiracy. Each of these alleged torts depends upon an allegation that the first respondent, Nutritek, made false representations as part of a common design and conspiracy with the other respondents to defraud VTB: amended particulars of claim, paras 27(f) and (g). They "acted in concert pursuant to a common design": amended particulars of claim, para 67(a). The nominal owner of Nutritek was the second respondent, Marcap BVI. Marcap BVI through another company owned and controlled Marshall Capital LLC ("Marcap Moscow"), and it is pleaded that "Marcap through Marcap BVI had de facto control of and beneficially owned in part Nutritek" (amended particulars of claim, para 68(a); see also para 55) and that "The whole transaction under which VTB was defrauded was co-ordinated by Marcap" (para 68(d)). "Marcap" is defined as "the Marshall Capital group of companies" (para 3). These pleaded formulations no doubt point to the reality that the affairs of Nutritek were controlled in Moscow, by Marcap Moscow through Marcap BVI, and, consistently with this, Marcap Moscow's offices and personnel feature prominently in the history of the transaction: see e.g. amended particulars of claim, paras 30 and 69 and para 19 below.

9. It follows that, even though the tort of deceit was itself committed in England, the alleged tortious responsibility of all the respondents depends upon its being established that they were party to a common design. On the facts of this case, it is also clear that any common design is alleged to have been and must have been formed in Russia. That is where Mr Malofeev and Marcap Moscow are based and it is "Marcap" who co-ordinated the transaction under which the fraud allegedly occurred and through Mr Malofeev as Marcap BVI's agent that the Court of Appeal held that there was a good arguable case against Marcap BVI: see judgment, para 127. As to Nutritek that was, like Marcap BVI, a British Virgin Islands company, but it was principally owned by two Russian companies (see amended particulars of claim, para 2(a)), it was managed in Russia, no doubt through Marcap Moscow, and the approach relating to the proposed sale and facility agreement was made on its behalf to VTB Moscow by Mr Malofeev. The principal witnesses from all three respondents who have been served in relation to the alleged torts will come from Russia.

10. The conclusion that the alleged tort of deceit is governed by English law is very relevant to the question of the appropriate forum, and I am prepared to assume that the alleged tort of conspiracy is also governed by English law. However, assuming English law to govern both alleged torts, no one suggests that this is decisive of the appropriate forum. For reasons I have already indicated, the common design on which VTB's tortious claims depend is thoroughly Russian.

The legal principles regarding appropriate forum

11. The appeal was originally presented to the Supreme Court as raising a significant issue regarding the nature and extent of the relevance of the governing law and the way in which this should be expressed. The suggestion was that a conclusion that the tort was committed in England gave rise to a "strong presumption" in favour of an English forum. It was submitted that the Court of Appeal had unjustifiably diluted this. It appears clear that it was only before the Court of Appeal that the suggestion was evidently first advanced. The judge's judgment makes no reference at all to the line of authority represented by *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey (The Albaforth)* [1984] 2 Lloyd's Rep 91, to which so much significance is now attached. The appellant's skeleton argument before the Court of Appeal raises the point, but does not in any way criticise the judge for not mentioning it – again indicating that the different counsel representing the appellant at that stage had not relied upon it.

12. The *locus classicus* in relation to issues of appropriate forum at common law is *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460, where Lord Goff of Chieveley gave the leading speech. He identified as the underlying aim in all cases of disputed forum, "to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice" (p 480G). But he also identified the important distinction in the starting point and onus of proof between cases where permission is required to serve proceedings out of the jurisdiction and situations where service is possible without permission: p 480G-H. The present case falls into the former category. In cases within that category, permission was not to be granted under the former rules of court "unless it shall be made sufficiently to appear to the court that the case is a proper one for service out" (RSC Ord 11, r 4(2)), and, as Lord Goff noted, the jurisdiction being exercised "may be 'exorbitant'" (p 481A-D). On this basis, Lord Goff concluded that:

> "The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so" (p 481E).

13. Lord Goff went on to explain that caution was necessary in respect of the word "exorbitant" – caution that explains his statement that the jurisdiction to serve out "may" be exorbitant. He noted (p 481F-482B) that the circumstances in which permission to serve out may be granted:

> "are of great variety, ranging from cases where, one would have thought, the discretion would normally be exercised in favour of granting leave (e.g., where the relief sought is an injunction ordering the defendant to do or refrain from doing something within the jurisdiction) to cases where the grant of leave is far more problematical. In addition, the importance to be attached to any particular ground invoked by the plaintiff may vary from case to case. For example, the fact that English law is the putative proper law of the contract may be of very great importance ….; or it may be of little importance as seen in the context of the whole case. In these circumstances, it is, in my judgment, necessary to include both the residence or place of business of the defendant and the relevant ground invoked by the plaintiff as factors to be considered by the court when deciding whether to exercise its discretion to grant leave; but, in so doing, the court should give to such factors the weight which, in all the circumstances of the case, it considers to be appropriate."

The modern rules reflect more precisely Lord Goff's statement of general principle, in providing that permission is not to be given unless the court is "satisfied that England and Wales is the proper place in which to bring the claim": CPR, rule 6.37(3).

14. In the present case, the appellants rely upon words of Robert Goff LJ, as he was, in an earlier Court of Appeal case: *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey (The Albaforth)* [1984] 2 Lloyd's Rep 91, and the acceptance of that case as consistent with *The Spiliada* by the House of Lords in the later case of *Berezovsky v Michaels* [2000] 1 WLR 1004. In *The Albaforth* Robert Goff LJ deduced from earlier case law that (p 96):

> "where it is held that a Court has jurisdiction on the basis that an alleged tort has been committed within the jurisdiction of the Court, the test which has been satisfied in order to reach that conclusion is one founded on the basis that the Court, so having jurisdiction, is the most appropriate Court to try the claim, where it is manifestly just and reasonable that the defendant should answer for his wrongdoing. This being so, it must usually be difficult in any particular case to resist the conclusion that a Court which has jurisdiction on that basis must also be the natural forum for the trial of the action. If the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the Courts of that jurisdiction are the natural forum. Certainly, in the present case, I can see no factors which could displace that conclusion."

15. In *Berezovsky v Michaels* a challenge to the consistency of this approach with *The Spiliada* was rejected by Lord Steyn in a speech with which the other two members of the majority agreed: speaking of a line of authority in which the approach taken in *The Albaforth* had been followed, he said (p 1014A-F):

> "The express or implied supposition in all these decided cases is that the substance of the tort arose within the jurisdiction. In other words the test of substantiality as required by *Kroch v Rossell* [1937] 1 Al1 ER 725 was in each case satisfied. Counsel for Forbes argued that a prima facie rule that the appropriate jurisdiction is where the tort was committed is inconsistent with the *Spiliada* case [1987] AC 460. He said that *Spiliada* admits of no presumptions. The context of the two lines of authority must be borne in mind. In *Spiliada* the House examined the relevant questions at a high level of generality. The leading judgment of Lord Goff of Chieveley is an essay in synthesis; he explored and explained the coherence of legal principles and provided guidance. Lord Goff of Chieveley did not attempt to examine exhaustively the classes of cases which may arise in practice, notably he did not consider the practical problems associated with libels which cross national borders. On the other hand, the line of authority of which *The Albaforth* is an example was concerned with practical problems at a much lower level of generality. Those decisions were concerned with the bread and butter issue of the weight of evidence. There is therefore no conflict. Counsel accepted that he could not object to a proposition that the place where in substance the tort arises is a weighty factor pointing to that jurisdiction being the appropriate one. This illustrates the weakness of the argument. The distinction between a prima facie position and treating the same factor as a weighty circumstance pointing in the same direction is a rather fine one. For my part the *Albaforth* line of authority is well established, tried and tested, and unobjectionable in principle."

16. *Kroch v Rossell* [1937] 1 All ER 725 was a case in which a foreigner describing himself as "a gentlemen of no occupation" claimed that he had been libelled in Le Soir, a publication with a daily circulation in Paris of about a million and a half, and in London of well under 50. He failed to establish any English reputation or connection, save temporary presence here to start the proceedings. Not surprisingly, the Court of Appeal thought that any breach here was technical and of no substance. It described the principles governing permission as requiring an examination of the circumstances to identify where the action should be better tried, in terms which foreshadowed Lord Goff's approach in *The Spiliada*.

17. *Berezovsky v Michaels* was concerned with an alleged libel of a Russian businessman in a magazine with sales of 785,000 in the USA, 1,900 in England and 13 in Russia. But, in contrast with the position in *Kroch v Rossell*, the claimant had significant connections with and reputation to protect in England. On the basis that the English tort was a separate one, for the pursuit of which England was prima facie the appropriate forum on the approach taken in *The Albaforth*, the majority in the House upheld the Court of Appeal's conclusion that England was the appropriate forum for its pursuit.

18. *The Albaforth* line of authority is no doubt a useful rule of thumb or a prima facie starting point, which may in many cases also prove to give a final answer on the question whether jurisdiction should appropriately be exercised. But the variety of circumstances is infinite, and the *Albaforth* principle cannot obviate the need to have regard to all of them in any particular case. The ultimate over-arching principle is that stated in *The Spiliada*, and, if a court is not satisfied at the end of the day that England is clearly the appropriate forum, then permission to serve out must be refused or set aside.

The history of the transaction

19. In the present case, there are two elements of the deceit by which VTB claims that it was deceived into entering into the facility agreement: the first goes to the ownership of the buyers, RAP; the second goes to the financial position of the dairy enterprises being sold to RAP. A large part of the evidence on these aspects by which VTB obtained permission to serve out of the jurisdiction on 11 May 2011 consisted of statements from Mr Konstantin Tulupov and Mr Vadim Muraviev, both of Moscow. There was further evidence in support of the application for permission to serve out, all from other Russian witnesses: see para 191 of Arnold J's judgment, quoted in para 41 below.

20. Mr Tulupov was until October 2008 employed at JSC, VTB Moscow as a director within the Investment Business Acquisition and Leverage Finance Team in Moscow. Mr Muraviev had no personal involvement in events but was when he made his statement in April 2011 the Head of the Division of Distressed Debt Settlement at VTB Moscow and made his statement on the basis of a series of interviews had on 1 February 2011 with various staff members of VTB, namely Colin Magee, VTB's then general counsel, Julia Ferris, director at VTB's legal counsel department, Peter Yates, VTB's head of credit portfolio management and administration and Martin Pasek, managing director of structuring at VTB.

21. Mr Tulupov explains that he was the project manager in respect of the facility agreement between VTB and RAP, a transaction that "was both high risk

but offered potentially significant benefits for VTB and VTB Moscow" (para 8). As such he would (para 70) attend meetings with and obtain information from potential borrowers, draft proposed terms of any loan to submit to VTB Moscow's credit committee, liaise with VTB where it was to be the lender of record, deal with any matters raised by VTB Moscow's credit committee, have the conduct of matters arising after any loan was made, although where VTB was the lender of record "the performance of the loan was also monitored by it" and in all these matters report to his managing director, Mr Konstantin Ryzhkov, and at times also to his superior, one of two senior vice presidents, Mr Vassily Kirpichev and Mr Alexander Yastrib, who in turn reported to the deputy president, Mr Levin. During the course of the present transaction, Mr Ryzhkov also became head of the investment business acquisition and leverage finance team of VTB in London (according to Mr Muraviev from 1 September 2007).

22. Mr Tulupov in para 8 deals with the two bases of the present claim. He states that the value of the shareholding and cash flow of the dairy companies was of considerable importance to VTB and VTB Moscow, since it represented the only real security of value, and for this reason they wanted an independent valuation and relied upon that provided by Ernst & Young dated September 2007. As to the alleged representation regarding ownership of RAP, he said:

> "G. Whilst it was entirely a matter for the Credit Committee of VTB Moscow, if VTB Moscow had known that the proposal for the sale by Nutritek was to a company under common control, it is likely VTB Moscow would have approached the proposal differently. In particular, I believe that it is likely to have viewed the proposal as one seeking asset finance rather than acquisition finance. Amongst one of the many additional matters that would have been considered (and to which I will briefly refer later in this statement) would be the provision of additional security;
>
> H. Given that it was disclosed to VTB Moscow at the outset that Nutritek was controlled by Marcap, which I understood was a family of funds controlled by Mr Konstantin Malofeev …. then Marcap was the obvious target to provide that security. This was particularly the case, when it was known to VTB Moscow that Nutritek urgently needed to raise funds to pay certain credit linked notes ("CLN") and that some of the monies raised by the sale of the Dairy Companies were being used to pay them. It would have been noteworthy if Marcap refused to provide security for the risk that VTB and VTB Moscow were taking."

23. Mr Tulupov proceeds at some length to set out the history of the transaction, starting with a meeting in Moscow where the proposed transaction was explained to Mr Ryzhkov and Mr Tulupov by Mr Malofeev and a Mr Provotorov, following which Mr Tulupov on about 18 July 2007 engaged Mr Johnston of Dewey & LeBoeuf, London to draw up finance documentation for a loan to an unknown borrower who Mr Malofeev and Mr Provotorov said they had in mind to approach to buy the dairy companies. VTB's director, Ms Bragina, responsible for investment business acquisition and leverage finance at VTB, was copied into the email and a party to the conference call by which Mr Tulupov instructed Mr Johnston. A subsequent enquiry by Mr Johnston of Mr Tulupov as to the identity of any borrower led to the answer, that "the potential purchaser is controlled by a group of individuals with whom, Marcap assures, you can't have any conflict of interest". Mr Johnston described this as evasive and said that VTB would need to do a KYC (know your customer) clearance on the borrower.

24. Arnold J's judgment records (para 14) that Mr Tulupov had a further meeting with Mr Provotorov and Mr Leonov in Moscow in late July, after which he emailed them with two versions of a term sheet, copying in Mr Malofeev, Mr Ryzhkov and Ms Bragina.

25. A third Moscow meeting involving Mr Tulupov, Mr Malofeev, accompanied by Mr Provotorov and probably also by Mr Yuri Leonov, took place at Marcap Moscow's offices in early October, when Mr Malofeev identified RAP as the potential buyer and borrower. But, according to Mr Tulupov, nothing was said to suggest that the sale would be to anything other than an independent third party, and that it would have been apparent to Mr Malofeev and his colleagues that what was being discussed was acquisition finance, rather than a balance sheet loan. A third term sheet was emailed by Mr Tulupov to the previous recipients, but not on this occasion copied to Ms Bragina. It identified VTB as the lender and recorded that additional commission was to be earned through a derivative tied to the shares and there was to be an interest rate swap to hedge interest and currency risks.

26. VTB was commonly lender of record on such transactions, because it could offer more sophisticated lending structures and because English law offers greater protection in the event of default, but in such cases VTB Moscow would lend the relevant monies to VTB, as here, under a 100% participation agreement, although, in addition VTB was in this case itself involved in providing the interest rate swap agreement. In these circumstances, from an early stage, Mr Tulupov also worked with his counterpart at VTB, Ms Bragina, copying her into emails.

27. Mr Tulupov's role was thereafter to obtain, check and distribute the information required by the various departments of VTB Moscow, to obtain their

reports and opinions, to draw these together in a "Deal Description" and "Draft Credit Committee Decision", to have these documents signed and approved by Mr Ryzhkov and then submitted to the Credit Committee of VTB Moscow, after approval by which "the decision would still need to be reviewed by both the Managing Board of VTB Moscow given the size of the loan and VTB as both the Lender of Record and the party entering into the Interest Rate Swap Agreement" (para 34). In performing his role, Mr Tulupov liaised principally with Mr Leonov, but also with Mr Provotorov and Ms Tyurina and in relation to Nutritek with Mr Skuratov, all in Moscow. One of the documents obtained in this process was the Ernst & Young report of 2007 on the dairy companies.

28. A draft Deal Description and draft Credit Committee Decision were prepared with the assistance of Dewey & LeBoeuf for VTB/VTB Moscow and of Clifford Chance for RAP and were then signed off by Mr Yastrib, Mr Ryzhkov and Mr Tulupov, before being reviewed and approved on 31 October 2007 at a meeting of VTB Moscow's credit committee, attended by Mr Novikov, Mr Yu, Mr Belov, Mr Kuzmenko, Mr Yastrib, Mr Shipilov, Mr Krasnoselsky and Mrs Bozhaeva. The approval recorded that the committee had, after taking "into consideration a good financial situation of the Borrower" classified the debt as "Quality Category 1".

29. The approval was subject to conditions. These included the provision of "a report for the assessment of the market value of the Shares and Stakes", a reference to the Ernst & Young report already provided, a further copy of which was provided by RAP and Mr Leonov on 7 November 2007 (and circulated by Mr Tulupov to Ms Bragina and Mr Magee, albeit in Russian, on 12 November). They also included further approval of the proposal by VTB Moscow's management board and VTB. Mr Tulupov recites that these approvals were obtained, the former by a formal board resolution, and that he was not involved in the latter, although he says that it was apparent from his discussions with Mr Ryzhkov and Ms Bragina that "they relied upon the false representations when approving the loan".

30. This refers to the Ernst & Young report of 2007, but it can hardly refer to any representation relating to the ownership of RAP, since Mr Tulupov goes on to say that, "once approval to the credit line had been obtained from VTB and VTB Moscow", steps were taken to implement the conditions precedent which "clearly included confirming the beneficial ownership of RAP as is apparent from the emails of 6 and 8 November" which are exhibited to his statement. None of the conditions precedent is, however, explicitly directed to obtaining such confirmation (even though one of them required the provision to VTB and VTB Moscow of the decisions of the authorised management bodies of RAP approving the acquisition).

31. As to the emails to which Mr Tulupov refers, these are from Ms Bragina, reporting to various colleagues in VTB (including Mr Yates) and copying to Mr Ryzhkov and Mr Tulupov, information that RAP's beneficiary and 90% shareholder (with the other 10% being owned by "his management team") was a Mr Vladmir Alginin, and giving some details of his recent business career. These emails are also relied upon by Mr Tulupov as an example of the involvement of Ms Bragina, who has left VTB and whose whereabouts cannot now apparently be ascertained. However, it seems clear that all they show is that Ms Bragina was passing on internally information which she had herself received from another unidentified source. VTB's very unspecific plea is that this was "information provided to VTB and VTB Moscow by the management of Nutritek": amended particulars of claim, para 51. There is no indication that Ms Bragina had any direct contact with the management of Nutritek, and the substantial likelihood must be that any information which reached her came from VTB Moscow.

32. VTB Moscow's management board approved the transaction on 13 November, and an application was signed by Ms Bragina and Mr Thunem on behalf of VTB for credit facilities. The application recorded that RAP had approached VTB Moscow for the debt financing of its proposed acquisition of the dairy companies, and that under the proposed structure VTB was to act as lender of record, but VTB Moscow was to "fully fund the transaction and fully undertake the credit risk under the transaction" in accordance with the participation agreement. It also recorded that the market value of the dairy company shares had been determined by Ernst & Young. On 19 November a similar application was signed off by Ms Wooi, Mr Yates and Mr Manning on behalf of VTB in respect of the interest rate swap. It however recorded the structure risk as "potentially high, but acceptable", on the basis that the transaction was considered unsecured, and the security package (RAP's shares in the dairy companies) of little tangible value, the financial risk as high, on the basis that, according to the historical balance sheets the price being paid for the companies appeared to be significantly above the book value of the assets. As to ownership risk, it recorded that no formal information could be found confirming that Mr Alginin was RAP's beneficial owner "as IB [investment banking] have advised", that they were requesting formal proof as a condition precedent to drawdown, and to make the ownership risk medium. There is no indication that this point was followed up, even in relation to the interest rate swap, and it is not part of VTB's case in respect of the loan that it relied upon any later representation regarding RAP's ownership or Mr Alginin.

33. Mr Tulupov continued to be the means by which the transaction was progressed, and sent VTB's mandate letter, updated term sheet and fee letter to RAP for signature on 16 November. On 23 November 2007, the facility agreement was completed, being signed for VTB by Mr Ryzhkov as "managing director, head of acquisition and leveraged finance" and by Ms Bragina as "director, acquisition

and leveraged finance". The interest rate swap agreement was completed on 28 November, being signed for VTB by Mr Ryzhkov as "managing director" and by Mr Steve Humphries as "senior manager operations". The 100% funded participation agreement between VTB and VTB Moscow was completed on the same date. Mr Thunem, then head of global markets at, but no longer with, VTB and Mr Ianovski signed for VTB. Under it, VTB's liability to repay any sum funded by VTB Moscow was limited to any amount that it received from RAP (or any other obligor under the loan facility). All these agreements were subject to English law, and included provisions recognising England as an appropriate forum in the event of any dispute.

34. Mr Muraviev's second-hand account of the history in his statement is understandably shorter. But, having spoken to Mr Yates, because both Ms Bragina and Mr Thunem had left, he understood that:

> "A. Once the decision had been taken by VTB Moscow to enter into the Participation Agreement, there was no need for the matter to be decided by the Credit Committee of [VTB];
>
> B. Instead, it was sufficient for the loan to proceed if the proposed transaction had been approved by Mr Ryzhkov, given his senior position within both [VTB] and JSC VTB, and the ACF [Advance Credit Facility] dated 13 November 2007 was signed off by the appropriate authorised signatories;
>
> C. Mr Ryzhkov approved the transaction and indeed he signed the Facility Agreement together with Ms Bragina on behalf of [VTB];
>
> ….
>
> H. Notwithstanding the position taken by Credit Risk in the ACF dated 15 November 2007 that 'Credit Risk consider this transaction as unsecured as the security package has little tangible value', in granting the loan and approving the ISA, [VTB] did rely heavily on the representations that had been made as to:
>
> > i. the past financial performance of the Dairy Companies and the forecast performance;

> ii. the 2007 E&Y 2007 Valuation of the Dairy Companies based upon those figures, and
>
> iii. The SPA representing a commercial transaction between two separate entities, namely RAP and Nutritek. It was entirely unaware that they were under the common control of Marshall Capital Group of Companies and believed them to be under separate control based on the information that had been provided by Nutritek."

35. Mr Muraviev concluded by saying:

> "11. Having spoken to Mr Yates, Colin Magee, Julia Ferris and Martin Pasek I am informed that and believe that if [VTB] had known that RAP and Nutritek were under the common control of Marshall BVI or that the representations identified above and contained in the 2007 E&Y Valuation were false then it would not have entered into the Facility Agreement or the ISA or permitted the draw down of the Tranche A monies."

The issues

36. Numerous judicial statements establish that it is incumbent on a defendant challenging the jurisdiction "so far as possible to identify the issues concerned and to state as clearly as possible how they arise or may arise in the proceedings": see e.g. *Limit (No 3) Ltd v PDV Insurance Co* [2005] EWCA Civ 383, [2005] 2 All ER (Comm) 347, 366, para 72, per Clarke LJ; *Dicey, Morris & Collins, The Conflict of Laws* (15th ed), para 11-143.

37. In the present case, the basic issues were in my view established by the evidence and submissions adduced below. The respondents deny that false representations were made, deny that they were party to any that were made, deny that any reliance was placed on any that were made and, for good measure, rely upon the participation agreement as showing that VTB, as opposed to VTB Moscow, did not suffer any loss. The last point was strongly argued in the courts below, as showing that VTB had no good arguable case in respect of which it could properly seek permission to serve out of the jurisdiction, but the Supreme Court refused permission to re-argue the point before it. The case must therefore be considered on the basis that the claim is properly arguable, but that this defence is among those that the respondents will advance to it. It is however essentially a

point of law, in relation to which there is no reason to think that the answer would be any different in Russia to here.

38. All the points mentioned in the previous paragraph were treated as issues in the courts below. In relation to one respondent, Marcap BVI, Arnold J concluded that there was no serious issue to be tried. But in relation to Nutritek and Mr Malofeev he concluded that VTB had a real prospect of establishing deceit, despite issues argued before him as to the incurring of any loss, the making of any false representations and reliance. The Court of Appeal considered that, even in respect of Marcap BVI, a serious issue to be tried existed, while setting aside service on all three respondents on the ground that England was not the appropriate forum.

39. A suggestion that the respondents should have advanced a positive case to support their denial of any involvement in the alleged deceit appears to me to go too far. Even where jurisdiction is established, a defendant is entitled to deny involvement in or liability for an alleged deceit, without advancing a positive explanation as to why he was not party to an alleged lie or conspiracy or as to how assets acquired proved, without any prior knowledge on his part, to be worth so much less than independent accountants had valued them as being. Further, no suggestion or objection appears to have been made below to the case being argued, as it was, on the basis that all the issues were properly raised by the respondents' general denials. On the other hand, there may be particular points, in relation to which, in the absence of any positive case from a defendant's side, it is not possible to conclude that any evidence will be called by the defence. That may in turn preclude bringing into account the convenience or otherwise of adducing in England or Russia any such evidence from the defence side as might be supposed to exist on such points, had any positive case been raised on them.

40. It is also clear, from such material as the Court has before it in relation to the issue regarding the worldwide freezing order, that VTB has been given a considerable understanding by Mr Malofeev himself of the nature of his case regarding the discrepancy between the position indicated by the Ernst & Young report of 2007 and the position as it materialised not very long after the completion of the transaction. Mr Michaelson, partner at SJ Berwin acting for Mr Malofeev recorded in his tenth statement of 18 October 2011 (paras 38 to 42) that Nutrinvestholding (Nutritek's parent) had at Mr Malofeev's instance instructed Ernst & Young to prepare a further report dated 26 February 2010, to determine precisely what accounting practices and transactions were taking place within the Nutritek business and that the report does not implicate Mr Malofeev. Mr Michaelson went on to refer to "the obvious inconsistency between Mr Malofeev commissioning the Report and at the same time being responsible for any wrongdoing identified" (para 43).

The judgments below

41. Arnold J addressed the question of the appropriate forum in paras 186 to 195:

> "186. *Stage I.* The factors that may be taken into account in determining which is the natural forum for the action include: (a) the personal connections which the parties have to the countries in question; (b) the factual connections which the events relevant to the claim have with those countries; (c) factors affecting convenience or expense such as the location of the witnesses or documents; and (d) the applicable law.
>
> 187. Counsel for VTB submitted that England was the natural forum because (i)VTB is English, (ii) the misrepresentations were relied upon in England, (iii) the money was lent and the loss sustained in England, (iv) the Facility Agreement, ISA, the Participation Agreement and the SPA contain English law and English jurisdiction or arbitration clauses and (v) the applicable law is English law. I do not consider that any of these factors points strongly to England being the natural forum in the present case. So far as (i) is concerned, VTB is controlled by VTB Moscow. As to (ii), as explained above, it seems to me that VTB's reliance was wholly secondary to that of VTB Moscow. In relation to factor (iii), the loss was sustained because Russian assets provided inadequate security. As to (iv) and (v), the English law clauses are immaterial once it is concluded, as I have, that the law applicable to the tort is Russian law. The English jurisdiction and arbitration clauses are a pointer to England, but not a strong one given that the claim is a tort claim not a contract claim.
>
> 188. Counsel for the defendants submitted that the following factors pointed to Russia being the natural forum. First, the connections of the parties to Russia. VTB is controlled by VTB Moscow, which is Russian. Furthermore, the litigation is being managed by VTBDC, which is also Russian. MarCap Moscow and Mr Malofeev are Russian. It is common ground that Nutritek was managed from Russia, and VTB's case is that Mr Malofeev controls both Nutritek and MarCap BVI. Furthermore, it is VTB's case that Mr Malofeev orchestrated the fraud, primarily through MarCap Moscow.
>
> 189. Secondly, the connections of the events constituting the torts to Russia. The transaction was introduced to VTB Moscow at meetings

between Russian individuals in Russia. The negotiations mainly took place in Russia. The misrepresentations were made and mainly received in Russia. The more important misrepresentation concerned the performance of the Dairy Companies, which are Russian companies. The 2007 E&Y Valuation was a valuation by Ernst & Young's Moscow office and was based on information provided by Nutritek's Russian management. The misrepresentations were primarily relied upon by VTB Moscow acting through its Credit Committee and Management Board in Russia. It was VTB Moscow and VTBDC which primarily dealt with RAP's default and enforcing the security. The secured assets were in Russia. The discovery of the fraud took place in Russia. Although the loss was sustained by VTB in England, as discussed above the ultimate economic impact is in Russia.

190. Thirdly, most of the witnesses are Russian and many of the documents are in Russian and located in Russia. So far as the witnesses are concerned, there are a considerable number of relevant Russian witnesses from VTB Moscow, VTBDC, Ernst & Young, Nutritek (Mr Skuratov and the managers of the Dairy Companies), MarCap Moscow (Mr Leonov, Mr Provotorov, Ms Tyurina and Mr Popov as well as Mr Malofeev) and RAP (Ms Kremneva and Mr Pankov). Other potential Russian witnesses include Mr Sazhinov and Mr Alginin. By contrast, there are relatively few material witnesses from VTB. The two most important ones appear to be Ms Bragina and Mr Ryzhkov. Both have left VTB (as has Mr Thunem). It appears that Mr Ryzhkov is in Russia, while VTB's evidence is that Ms Bragina is 'believed to be' in England. Although Mr Ryzhkov has been contacted about the matter, it does not appear that Ms Bragina had been.

191. As counsel for the defendants pointed out, it is striking that all of VTB's witness statements in support of its application for permission to serve out, other than one from its solicitor, were made by Russian witnesses. In addition to the statements of Mr Tulupov and Mr Chernenko, these consisted of:

> i) a statement made by Andrey Puchkov, Deputy Chairman of VTB Moscow, which among other matters dealt with VTB Moscow's reliance on the misrepresentations alleged, Mr Puchkov having been present at the Management Board meeting on 13 November 2007 at which the transaction was approved;

ii) a statement made by Vadim Muraviev, Head of the Division of Distressed Debt Settlements at VTB Moscow, who gave evidence as to VTB's reliance on the misrepresentations alleged based on interviews with four English employees of VTB including Mr Magee and Mr Pasek; and

iii) a statement made by Denis Zemlyakov, General Director of VTBDC, who gave evidence concerning RAP's default and the enforcement of the security.

192. In addition, VTB relied on two draft statements from Alexander Buryan and Irina Leonova, who were employed by RAP as Vice-President and Chief Accountant. Furthermore, since then a number of statements have been made by Arthur Klaos of VTBDC, in the most recent of which Mr Klaos relays information provided to him by (among others) Mr Ryzhkov and Alexander Yastrib (at the time Senior Vice President of VTB Moscow and now a board member of the Bank of Moscow).

193. While the four VTB employees interviewed by Mr Muraviev are evidently material witnesses to VTB's claim (although Mr Magee and Mr Yates appear to have had more involvement in the transaction than Mr Pasek or the fourth employee Julia Ferris), it is clear that they are of secondary importance compared to Ms Bragina and Mr Ryzhkov, let alone Mr Tulupov and his colleagues in Moscow. If the claim is tried in England, witnesses located in Russia will not be compellable except by means of letters rogatory. Even if they are prepared to give evidence voluntarily, they may not be prepared to come in person, necessitating evidence being given by videolink. Even if they are prepared to come in person, they are likely to require interpreters. As for the documents, many of these have required or will require translation. It is true that the agreements are mainly in English, and that these are important documents, but these and other documents in English form a relatively small proportion of the relevant documents even at this stage of the proceedings.

194. Fourthly, counsel for the defendants submitted that the applicable law was not a strong factor in favour of England even if it was English law. It is clear from the expert evidence before the court (as to which, see below) that the Russian courts can receive expert evidence as to English law. Furthermore, the key issues in the case

are likely to be factual rather than legal. In the event, of course, I have concluded that the applicable law is Russian law, which supports the conclusion that Russia is the natural forum.

195. In my judgment, taking all the factors considered above into account, the natural forum is Russia."

42. The Court of Appeal - before which reliance was, for the first time, placed on the suggested presumption arising from *The Albaforth* (see para 14 above) - dealt with the issue of appropriate forum as follows:

"164. We have already commented that the judge may have erred in his interpretation of the test adumbrated in the *Spiliada* case. Instead of asking first whether England was the 'natural forum' and then, even if it is not, asking whether England is nevertheless the appropriate forum for other reasons, there is only one overall question to be answered: has VTB established that England is clearly or distinctly the appropriate forum?

165. In our view the judge was correct to conclude that VTB has failed to do so. The steps leading to our conclusions are as follows: first, we will assume (based on our discussion above) that the fact that VTB has sustained its loss resulting from the torts in England raises a prima facie case that England is the appropriate forum in which to try the disputes. Secondly, however, we have to take account of all the other factors identified by both sides in order to determine whether VTB has satisfied the court that England is clearly or distinctly the appropriate forum.

166. Thirdly, in that regard, we have concluded, on the basis of the material presently before us, that the applicable law of the torts is Russian law. That cannot be a concluded view. Wherever a trial takes place, it can be challenged. But that point works both ways. Even if we had concluded that the applicable law of the torts was English law, this would not have been a factor that would weigh heavily in making England the appropriate forum, precisely because if the defendants wished to allege and plead that the applicable law was Russian law, both sides would have had to prepare for a trial on that basis. If the case were to be heard in England, both sides would have to prepare expert evidence on Russian law; and, doubtless, the obverse would be so if the case were to be heard in Russia. This is not a case, such as we think Lord Goff of Chieveley contemplated in

> *Spiliada* at 481G, where the law of the contract is a known certainty. In this case the applicable law of the torts remains very much in issue. Moreover, there was no serious challenge to the judge's view (at para 194) that the key issues in the case are likely to be factual rather than legal.
>
> 167. Fourthly, we have to give due weight to all the other factors (apart from those where we have found the judge erred) which the judge took into account and which have not been challenged on appeal. These are set out at paras 188 and 189 of the judgment and, as we have indicated in relation to the applicable law point, we think that these indicate that the centre of gravity of these disputes is in Russia, not England. Fifthly, VTB has not challenged the judge's conclusion that VTB had failed to show that there was a real risk that it would not obtain substantial justice in Russia for any of the reasons it advanced before him.
>
> 168. Accordingly, the judge was correct to set aside Chief Master Winegarten's order granting VTB permission to serve the proceedings on Nutritek, Marcap BVI and Mr Malofeev out of the jurisdiction."

The factors relevant to the appropriate forum

43. I turn therefore to consider the appropriate forum and the relevant factors. The first question is whether there is any basis for regarding the judge's or the Court of Appeal's conclusion as flawed in any way which would require this Court as a second appellate court to revisit the exercise of the discretion to give permission for service out of the jurisdiction. The second question, if there is any such basis, is what conclusion this Court should reach on the issue as to the appropriate forum.

44. The Court of Appeal re-exercised the discretion, because it believed that Arnold J had erred in his interpretation of Lord Goff's speech in *The Spiliada*. It said that he had adopted a two-stage approach instead of recognising that, in a service out case, there was a single burden on a claimant to show that England was clearly or distinctly the appropriate forum (paras 128-131 and 164; and see *The Spiliada*, p 481D-E). But the two-part approach was the one which Lord Goff identified as appropriate in cases where service is effected within the jurisdiction, so that the claimant starts with the advantage of having achieved a legitimate basis for jurisdiction without leave, and it is for the defendant to show that some other country is the appropriate forum: see *The Spiliada*, pp.476F. Any error therefore

favoured VTB as claimant. Any error, if error there was, does not in any event impact on the force and weight of the judge's analysis in the paragraphs quoted above. Further, the way the judge answered his two-part test shows that he could not conceivably have come to any conclusion other than that the claimant had failed to show (clearly or at all) that England was the appropriate forum. He expressed his conclusion, at stage 1 of the two-part test which he (wrongly) adopted, as being that Russia was the natural forum (para 195) before going on at stage 2 to reject any suggestion that substantial justice could not be obtained in Russia (para 196 to the conclusion at para 222). Once one concludes that Russia is the natural forum, where there is no risk that substantial justice cannot be obtained, it is really impossible to conclude that England is clearly the appropriate forum. The Court of Appeal itself held that the judge was correct to conclude that VTB had failed to establish that England was clearly or distinctly the appropriate forum (para 165). However, it itself fell into error in my view in its treatment of the governing law.

(a) Governing law

45. The Court of Appeal was wrong to regard Russian law as governing the alleged torts, but it acknowledged that possibility and it dealt with the alternative, that English law governed them. However, in relation to this alternative, it was in my opinion also wrong to approach the matter on the basis that it made no difference which law governed, because each side would have in any event to prepare evidence on both legal systems in whichever country the case was tried.

46. The governing law, which is here English, is in general terms a positive factor in favour of trial in England, because it is generally preferable, other things being equal, that a case should be tried in the country whose law applies. However, that factor is of particular force if issues of law are likely to be important and if there is evidence of relevant differences in the legal principles or rules applicable to such issues in the two countries in contention as the appropriate forum. Neither of these considerations here applies.

47. VTB's claims are for deceit and for conspiracy. The conspiracy alleged is to obtain finance by the deceit. Accepting that the governing law of both alleged torts is, to English legal eyes, English, there is nothing to show that Russian law would reach any different conclusion. Parties are able to plead and rely on English law in Russian courts. But, even if there were reason to think that a Russian court would regard Russian law as governing the alleged torts, there is nothing to suggest that Russian law does not recognise and impose tortious liability for deceit, and for conspiracy to commit a deceit, on bases for material purposes equivalent to those which would be recognised under English law. It is unlikely that it does not, and no evidence has been adduced that it does not. It would have been for VTB to

adduce evidence on all these points, if it could, in support of its case that England was the appropriate forum.

48. Although Arnold J wrongly concluded Russian law governed the alleged torts, he also considered the exercise of his discretion on an opposite basis, namely that English law applied, and, as I understand him, accepted the submission that this would not be a strong factor in favour of England, as well as saying that it was clear that the Russian courts could if necessary hear evidence of English law: see judgment, para 194 quoted above. His judgment therefore addresses the position on a correct hypothesis.

49. Even if, contrary to my view, the judge's conclusion as to the appropriate forum was limited by an assumption that Russian law governed the alleged torts, I cannot conceive, in the light of what he said in para 194, that it would have made any difference to his conclusion if he had concluded that English law governed. The key issues in this litigation will on the face of it be factual not legal.

(b) Place of commission of tort

50. For reasons already given, I proceed on the basis that this was London in relation to the claim in deceit, and that the conspiracy, being to commit the same deceit, should be regarded as effectively ancillary. But I also note that, Mr Ryzhkov as managing director of VTB's acquisition department was the first signatory of the Facility Agreement for VTB, and he was based in Moscow. It may well be that his signature was sent or collected electronically from Moscow. Even if that were so, he is in Russia, and on any view an important potential witness.

51. The place of commission is a relevant starting point when considering the appropriate forum for a tort claim. References to a presumption are in my view unhelpful. The preferable analysis is that, viewed by itself and in isolation, the place of commission will normally establish a prima facie basis for treating that place as the appropriate jurisdiction. But, especially in the context of an international transaction like the present, it is likely to be over-simplistic to view the place of commission in isolation or by itself, when considering where the appropriate forum for the resolution of any dispute is. The significance attaching to the place of commission may be dwarfed by other countervailing factors.

52. Here the common design on which the respondents' tortious responsibility is based was formed in Russia. Further, both the alleged representations emanated from Russia, in the form of the Ernst & Young 2007 report and the information that Mr Alginin was the effective beneficial owner of RAP. The history of the

transaction which I have set out indicates that the transaction was introduced, pursued and approved predominantly in Moscow. It is difficult to avoid the conclusion that VTB was effectively following suit on decisions taken there. Further, significant aspects of the facts which are said to have rendered the representations untrue existed in Russia: particularly, the dairy companies' businesses and financial positions, but also, presumably, the factual control which Mr Malofeev is said to have exercised directly or through Marcap Moscow over RAP.

53. VTB, as a London based bank, must have had to go through some formal decision-making processes, or it would not have been party to the facility agreement at all. However, it did not need to put the loan proposal through its own credit committee, once it had been through VTB Moscow's credit committee (para 34 above). Further, the main documents emanating from VTB, the two credit applications of 13 and 15 November, date from well after the matter was approved by VTB Moscow's credit committee on 31 October and are contemporaneous with the approval of 13 November by VTB Moscow's management board. Finally, no formal record of any decision-making or approval by VTB itself exists, save in the form of Mr Ryzhkov's and Ms Bragina's signatures on the facility agreement. All this is however unsurprising when the transaction was effectively negotiated and decided upon in Moscow, and the funding and credit risk in respect of the loan was being fully assumed by VTB Moscow.

54. Arnold J was not referred to *The Albaforth*, but in my view his approach in paras 186 to 195, cited above, was consistent with the proper application of the overriding principles of *The Spiliada* by which he correctly directed himself. It is true that at an earlier point in his judgment, when determining the governing law of the alleged torts to be Russian, he wrongly identified Russia as their place of commission (paras 134 to 135). But, as I have already said, in para 187 he also considered the exercise of the discretion to serve out on the opposite hypothesis, namely that English law governed the torts. Had he had cited to him *The Albaforth*, I do not see how it could or should, in the light of the other factors that he correctly identified, have led him to any different result than that to which he in fact came. It is clear that in his view the other factors pointed very powerfully towards Russia as the natural forum for resolution of the issues.

55. Further, the Court of Appeal, before which *The Albaforth* was relied upon, did not regard it decisive in the circumstances of this case (para 166 et seq). It erred in treating Russian law as governing the alleged torts, but went on largely to eliminate the significance of this error by treating it as irrelevant which law governed. It should have treated English law as governing the torts and have recognised this as one factor generally tending to favour English jurisdiction. But, for reasons explained in paras 46 to 49 above, it was in this case a factor of very little if any real potency. Had the Court of Appeal approached the potential

relevance of the governing law on a correct basis, it is in my view clear that it would in this case also have made no difference to its ultimate conclusion.

56. The Supreme Court is, in these circumstances, being asked to re-exercise the discretion exercised at two stages below in the light of points made about their reasoning of no real significance, which it is clear would not have altered the decision in either court.

(c) The factual focus

57. VTB's case is that deceitful representations emanated from the respondents in Russia, but were communicated to VTB, and relied upon by VTB, in London where VTB also suffered its loss. This analysis is important when considering where the tort was committed and what law governs it. But a wider view is necessary when considering the appropriate forum. The respondents' denials of any liability raise as issues whether the representations were inaccurate, whether, if so, any or all of the respondents knew of their inaccuracy and whether they joined together by "common design" to make the alleged representations and what impact any inaccuracy of such representations had.

58. Taking the Ernst & Young 2007 report, the factual focus will be on the dairy companies and on the respondents' understanding of their affairs and financial position, matters which are clearly likely to be more appropriately examined in Russia, where the companies, their records and any relevant company witnesses are. Ernst & Young examined the companies through their Moscow office, and the same is probably true of VTB's expert accountants, Deloittes. It is clear (para 40 above) that Mr Malofeev's case is that he was as unaware as Ernst & Young of the financial inaccuracy of their report. Secondly, relevance may attach to the impact which the Ernst & Young report had on those to whom it was first presented in Moscow.

59. As to the ownership of RAP, the plan, which VTB has produced showing Mr Malofeev's alleged connection with and/or control of RAP, shows an international picture. On many aspects of the plan, evidence about the alleged corporate and personal links could be adduced as easily in England as in Russia. But any evidence from Mr Malofeev, who is said to have been in control of a web of interlinking companies as shown on the plan, would more conveniently be heard in Russia. The judge noted, however, the respondents did not adduce before him any positive case challenging VTB's contention that Mr Malofeev ultimately controlled RAP as well as Nutritek. That does not mean that this is not in issue. But it does mean that, in the absence of any positive challenge, the convenience or

otherwise of Mr Malofeev giving evidence on it in England or Russia can be put on one side.

60. On the other hand, the issue relating to reliance is one on which VTB will clearly have to adduce the relevant evidence from its side. Again, it is likely that the relevant evidence will come in large measure from Russia and Russian witnesses. The informality of the alleged representation regarding RAP's ownership and regarding Mr Alginin, and the apparent failures to follow it up by obtaining more formal confirmation, is striking. It is likely to lead to questions as to how much, if any, weight was placed upon any such representation by VTB or VTB Moscow.

61. Ms Bragina cannot now be located and is not shown to have remained in England, and the representations said to be evidenced by her two emails in November 2007 seem, as already stated, likely to have come to her via VTB Moscow: see amended particulars of claim, para 51 and para 31 above, by a process which is obscure. The impact or lack of impact which it had on those to whom it was first presented in Moscow is thus likely to be a very relevant subject of examination in the litigation, on the basis that the substantial decision-making process took place in Moscow, with VTB following in very large measure suit.

(d) Witnesses

62. This is a factor at the core of the question of appropriate forum. It was covered fully and helpfully by Arnold J in the course of considering the "natural forum" in paras 188 to 195 of his judgment, set out in full above. In summary, it is clear that the issues and evidence will be focused overwhelmingly on matters which happened in and concern Russia, and that the oral and documentary evidence, on both factual and expert matters, is likewise likely to be overwhelmingly Russian and to be found in Russia, where it could be heard in Russian without translators.

(e) Aim of the alleged torts

63. The alleged torts were designed to induce VTB to enter into a facility agreement with RAP which was subject to English law and an agreement (for the benefit of VTB only) that the courts of England should have non-exclusive jurisdiction and be the most appropriate and convenient forum: clause 35.1. The purpose of the facility agreement was in turn to fund RAP's purchase of the dairy companies from the first respondent, Nutritek International Corpn.

64. I am inclined to agree with Arnold J (para 187) that the fact that the facility agreement was subject to English law is not relevant. He discounted it because of his view, erroneous on the basis on which I approach the case, that the tort claims were subject to Russian law. But, in my view, even though the tort claims are subject to English law, it bears scarcely - if at all - on the appropriateness of the forum for their resolution that they were designed to induce another English law contract. No issue arises about the interpretation of the facility agreement.

65. On the other hand, the fact that the alleged torts were designed to induce the making of a loan facility agreement, under which England was accepted as the most appropriate and convenient forum is a potentially relevant factor. It links with and reinforces the fact that, if there was any such deceit and/or conspiracy as alleged, the same were directed at VTB in London. But it is a factor which Arnold J did take into account (para 187). He saw it as "a pointer to England, but not a strong one given that the claim is a tort claim not a contract claim". I agree with this balanced view. But, even if it understates the significance of the pointer, it does so only slightly and not in a way which can, in my view, possibly justify this Court in interfering with the judge's conclusion.

66. There is certainly general attraction in a conclusion that persons committing deceit should answer in the jurisdiction which is not merely that where their deceitfulness manifested itself, but also a jurisdiction agreed to be appropriate under the contract which they are by such deceit inducing. But that formulation, by omitting the word "allegedly", begs the question where the issue whether any such deceit occurred and induced the loan should most appropriately be determined. All that has been established at this stage is that there is a serious issue to be tried - in other words, that VTB has a reasonable prospect of success - in respect of VTB's tort claims. The question where such claims are appropriately to be tried has to be answered in the light of all the circumstances, including the nature of the issues to be tried and the evidence which would be involved. The alleged torts were committed in England under English law, but the fundamental matters in dispute - whether there was any such deceit, whether the respondents were party to it, and what, if any impact, any falsely made representations had on VTB are, as I have shown, heavily focused in this case on Russia and Russian witnesses.

(f) Fair trial?

67. There is, as the Court of Appeal mentioned in para 167, no suggestion that this matter could not or would not receive a fair and proper trial in Moscow.

Conclusions

68. On the issues relating to the appropriate forum which the courts below addressed, the reasoning of Arnold J and the Court of Appeal was, subject to differences which I have identified, largely concurrent. The Court of Appeal erred in its approach to the significance of the law governing the alleged torts, but Arnold J, although he erred in regarding the governing law as Russian, also, as I read para 194 of his judgment, expressed his view as to the appropriate exercise of his discretion on the assumed opposite basis, that English law applied. For reasons which I have set out in paras 54 and 55 above, neither Arnold J's error as to the governing law of the alleged torts, nor the Court of Appeal's failure to recognise the potential significance of the governing law of such torts, can have been decisive in relation to the concurrent conclusions which they both reached.

69. In short, Arnold J's analysis and exercise of his discretion cannot in my view be faulted in any substantial respect, and I see no basis on which this Court would be justified in setting aside his exercise of his discretion and re-exercising the discretion for ourselves, still less in arriving at a different conclusion from his. The case is one in which an appellate court should refrain from interfering, unless satisfied that the judge made a significant error of principle, or a significant error in the considerations taken or not taken into account.

70. However, if it were incumbent on us to re-exercise the discretion regarding service out, I would myself arrive at the same conclusion as the judge and the Court of Appeal. Once again in summary, the major part of the factual subject matter involves Russia, and it is clear that the great bulk of evidence on both sides will have to come from Russian witnesses. The location in law of the alleged torts is of much diminished relevance, on examination of their circumstances and place in which they are said to have originated, the process by which they are said to have reached and impacted on VTB and the evidence which would be involved in undertaking such examination. The fact that any deceit was intended to induce an English law contract which provided for English jurisdiction is relevant, but cannot determine the appropriate forum in which to decide whether there was in fact any such deceit or conspiracy.

71. In my opinion, the Russian connection is of such strength and importance in this case that, despite the existence of some factors favouring England, the appellant is quite unable to discharge the onus on it of showing that England is clearly or distinctly the appropriate forum for determination of the issues in this case.

The proposed contractual claim based on piercing the corporate veil

72. I agree with Lord Neuberger's judgment on this aspect and would accordingly uphold the Court of Appeal's decision to refuse VTB permission to amend to raise a contractual claim based on piercing the corporate veil and treating the defendants liable for breach of the Facility Agreement and/or associated interest rate swap.

The Freezing Order

73. Like Lord Wilson (paras 159 to 160), I am concerned that a freezing order should have been in force for some 14 months despite concurrent decisions below concluding that jurisdiction should not be exercised and, at least in the view of the judge, that, irrespective of whether jurisdiction should be exercised, the freezing order originally granted should not be continued. On any view, this position reinforces Lord Neuberger's comments in paras 81 to 93 with which I would associate myself.

Conclusion

74. I would in the light of my above conclusions dismiss this appeal on both the issues of jurisdiction and amendment and order that the freezing order be discharged.

LORD NEUBERGER

Introductory

75. This appeal raises two main questions which arise out of a claim brought in the High Court by VTB Capital PLC ("VTB") against (i) Nutritek International Corp ("Nutritek"), (ii) Marshall Capital Holdings Ltd, (iii) Marshall Capital LLC, and (iv) Konstantin Malofeev (together "the defendants"), based on the torts of deceit and conspiracy. The first main question is whether the permission granted ex parte to VTB to serve the proceedings out of the jurisdiction on the defendants should be set aside. The second main question is whether VTB should be allowed to raise an additional claim, by way of amendment to its statement of case, based on piercing the corporate veil.

76. Arnold J and the Court of Appeal each concluded that the answer to the first question was yes, and to the second question was no – see, respectively [2011] EWHC 3107 (Ch), and [2012] EWCA Civ 808. VTB appeals against both

conclusions. The first question turns on whether the English court is the appropriate forum for the hearing of VTB's claim. The second question turns on whether VTB has an arguable case on piercing the corporate veil.

77. The background facts have been fully set out in paras 165 to 180 of Lord Clarke's judgment, in paras 19 to 40 of Lord Mance's judgment, (as well as in paras 9 to 37 in the judgment of Lloyd LJ in the Court of Appeal, and in paras 4 to 56 of Arnold J's judgment).

78. I shall discuss both questions on the basis that they arise between VTB and Mr Malofeev, because (subject to the point that Marcap Capital LLC has not been served), it appears to be common ground that (i) the position of the other three defendants in relation to the first question is no different from his, (ii) the position of Marshall Capital Holdings Ltd and Marshall Capital LLC (together "Marcap") in relation to the second question is no different from his.

The first question: the appropriate forum: three general points

79. In very summary terms:

(i) VTB's substantive case is that it was induced by deceitful misrepresentations, for which the defendants were responsible, to enter into certain agreements ("the agreements") with various parties, in particular Russagropom LLC ("RAP"), under which VTB agreed to lend, and thereafter did lend, money to RAP;

(ii) VTB obtained permission *ex parte* to effect service of proceedings, claiming damages for deceit and conspiracy, on the defendants out of the jurisdiction, and the defendants then applied to set aside service on the ground that Russia, rather than England, was the appropriate forum for the issues to be determined.

80. In a case such as this, permission to serve out of the jurisdiction should only be granted if the court is satisfied that England and Wales is "the proper place in which to bring the claim" – see CPR 6.37(3). It was common ground that this means that VTB could only succeed on the first question if it was able to establish that, in the words of Lord Goff of Chieveley in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, 481, the courts of England and Wales (hereafter "England") are "clearly" "the appropriate forum for the trial of the action".

81. When a court is called upon to decide whether an action should proceed in this, as opposed to another, jurisdiction, it is being asked to decide a procedural

issue at a very early stage. Where, as is now the position in this case, it is common ground that the parties would have a fair trial in the competing jurisdiction, the exercise will normally involve the court weighing up a number of different factors, and deciding where the balance lies. Whilst the same considerations will not always apply to applications for permission to serve out and applications for stays of proceedings, the argument on this appeal has highlighted three general points in relation to each type of exercise.

82. The first point is that hearings concerning the issue of appropriate forum should not involve masses of documents, long witness statements, detailed analysis of the issues, and long argument. It is self-defeating if, in order to determine whether an action should proceed to trial in this jurisdiction, the parties prepare for and conduct a hearing which approaches the putative trial itself, in terms of effort, time and cost. There is also a real danger that, if the hearing is an expensive and time-consuming exercise, it will be used by a richer party to wear down a poorer party, or by a party with a weak case to prevent, or at least to discourage, a party with a strong case from enforcing its rights.

83. Quite apart from this, it is simply disproportionate for parties to incur costs, often running to hundreds of thousands of pounds each, and to spend many days in court, on such a hearing. The essentially relevant factors should, in the main at any rate, be capable of being identified relatively simply and, in many respects, uncontroversially. There is little point in going into much detail: when determining such applications, the court can only form preliminary views on most of the relevant legal issues and cannot be anything like certain about which issues and what evidence will eventuate if the matter proceeds to trial.

84. This concern is not new. In *Cherney v Deripaska* [2009] EWCA Civ 849, paras 6 and 7, Waller LJ said that whilst he "appreciate[d] that litigants do often feel strongly about the place where cases should be tried … disputes as to forum should not become state trials". He also lamented the "mountain of material" the Court faced in that case, and suggested that it "would have been better for both parties and better use of court time if they had expended their money and their energy on fighting the merits of the claim."

85. In *Friis v Colburn* [2009] EWHC 903 (Ch), paras 3 and 5, having set aside an order for service out of the jurisdiction, Peter Smith J referred to the fact that the claimants' costs schedule was £215,280.50, following a hearing which, he said, had been "strung out by unrealistic stances and unnecessarily prolonged and complicated submissions which seem[ed] to achieve nothing other than create fogs of irrelevancy".

86. In that connection, the present case is striking, as Arnold J explained in para 3 of his judgment. The hearing before him lasted six days, after two days' pre-reading. He was faced with more than 27 bundles of documents, written evidence, and exhibits, and 14 bundles of authorities. One of the witnesses had made twelve witness statements, and further materials were added on a daily basis. (The hearing was not limited to the application to set aside permission to serve out: it included an application to amend, and applications to continue and to discharge a freezing order; however, no more than half the material and time can have been devoted to those aspects.)

87. Since the hearing of this appeal, the Court of Appeal has given judgment in *Alliance Bank JSC v Aquanta Corporation* [2012] EWCA Civ 1588, a case involving similar issues to those in this appeal. At para 4 of Tomlinson LJ's judgment in that case, he referred to the fact that the first instance hearing of the application to set aside permission to serve out, on the grounds that England was an inappropriate forum (as well as raising some other points), lasted eleven days, and the hearing in the Court of Appeal appears to have lasted four days.

88. In *Spiliada* [1987] AC 460, 465, Lord Templeman expressed the hope that in a dispute over jurisdiction, "the judge will be allowed to study the evidence and refresh his memory of [the principles] in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days." That was a rather optimistic aspiration, not least when one bears in mind the understandable desire of lawyers to do, and to be seen by their clients to be doing, everything they can to advance their clients' case, especially where the dispute over jurisdiction may well be determinative of the outcome.

89. However, particularly with the benefit of procedural reforms, which have been introduced, or are in the process of being introduced, following reports from Lord Woolf and Lord Justice Jackson, the judiciary is now encouraged to exercise far greater case management powers than 25 years ago. Accordingly, judges should invoke those powers to ensure that the evidence and argument on service out and stay applications are kept within proportionate bounds and do not get out of hand.

90. The second point is, in a sense, a sub-set of the first point, and concerns the extent to which a defendant who is challenging the jurisdiction of the English court should identify the nature of his case. In my view, the position is reasonably clear. As a matter of principle, a defendant is entitled to keep his powder dry: he can simply put the claimant to proof of its case. In general at least, that is true at any point of the proceedings. The mere fact that the defendant is challenging jurisdiction does not somehow impose a duty on him to specify his case. The onus

is on the claimant to satisfy the court that there is a serious issue to be tried on the merits of the claim, and not on the defendant to satisfy the court that he has a real prospect of successfully defending it.

91. However, if the defendant chooses to say nothing, then it would be quite appropriate for the court to proceed on the basis that there is no more (and no less) to the proceedings than will be involved in the claimant making, or trying to make, out its case. Of course, in many instances, the defendant will be able to say that, although he has not submitted a draft statement of case, or produced a witness statement, setting out the details of his case, its nature is clear from correspondence, common sense, or even submissions. Consistent with my observations on the first point, I would not want to encourage a defendant to go into great detail as to his case in a long document with many exhibits, but if he is wholly reticent about his case, he can have no complaint if the court does not take into account what points he may make, or evidence he may call, at any trial. I agree with Lord Clarke that a defendant could exhibit draft points of defence, but in many cases, it may be disproportionate to expect him to incur the costs of doing so before it has been decided whether the claim is to proceed at all.

92. The third point was expressed by Lord Bingham in *Lubbe v Cape plc* [2000] 1 WLR 1545, 1556. He said, in the context of an application for a stay of proceedings on grounds of forum non conveniens, that

> "[t]his is a field in which differing conclusions can be reached by different tribunals without either being susceptible to legal challenge. The jurisdiction to stay is liable to be perverted if parties litigate the issue at different levels of the judicial hierarchy in the hope of persuading a higher court to strike a different balance in the factors pointing for and against a foreign forum."

Precisely the same applies in many cases involving permission to serve out.

93. As Mr Mark Hapgood QC, who appeared for Mr Malofeev, said, appellate courts should be vigilant in discouraging appellants from arguing the merits of an evaluative interlocutory decision reached by a judge, who had to balance the various factors relevant to the appropriate forum, when the complaint is, in reality, that the balance should have been struck differently.

94. Lord Templeman in *Spiliada*, at 465 said that the determination of the appropriate forum is "pre-eminently a matter for the trial judge", because "Commercial Court judges are very experienced in these matters", and "[a]n

appeal should be rare and the appellate court should be slow to interfere". This case was in the Chancery Division, whose judges entertain such issues less commonly than their Commercial Court colleagues, but their experience and expertise are such that the same conclusion applies. As Tomlinson LJ said at para 117 of his judgment in *Alliance Bank*, an appellate court "should hesitate long before interfering with the judge's assessment" on such an issue.

The first question: the appropriate forum: the instant appeal

95. Lord Mance and Lord Clarke have each fully considered the first question in their respective judgments, and have come to different conclusions. Given that the first question is so fact-specific, and is the subject of two full judgments in this court (not to mention two full judgments below), it would not be appropriate for me to go into the facts and issues canvassed between the parties.

96. Lord Mance in paras 41 and 42 of his judgment has set out the passages in the judgments of Arnold J and the Court of Appeal respectively, which contain the centrally relevant reasoning of those tribunals on the first question which we have to decide. At least on the face of it, those passages each involve a classical interlocutory weighing up exercise with which an appellate court should be slow to interfere. Of course, that does not detract from the point that the Court of Appeal will consider any argument that the judge took into account any irrelevant or mistaken material, or omitted some relevant material, which could well have influenced the conclusion reached, or that the case is one of those even more unusual cases where the judge's conclusion was one that no reasonable judge could have reached.

97. It is worth emphasising that, as Lord Wilson says, the exercise carried out by the judge and by the Court of Appeal on the first question was not the exercise of a discretion but an evaluative, or a balancing, exercise, with which, as Lord Goff said in *Spiliada* at 465 an "appellate court should be slow to interfere" (also reflected in Lord Bingham's observation in *Lubbe* quoted in para 92 above).

98. In my view, there are no good grounds upon which this court should interfere with the decision of the Court of Appeal on the first question, and I also consider that there were no good grounds upon which the Court of Appeal could have interfered with the decision of Arnold J on that question. In that connection, there are one or two points worth mentioning.

99. First, were the Court of Appeal correct to hold that Arnold J went wrong in a way which justified them reconsidering his conclusion? In my view, they were

right to say in paras 131 and 129 of their judgment that he should have asked himself the single question identified in para 80 above, whereas he approached the issue through two slightly different questions. However, I am unconvinced that this represented an error of significance. The nub of Arnold J's reasoning, quoted by Lord Mance in para 41 above, shows, to my mind, that the judge ultimately adopted the right approach to the question which he had to resolve.

100. Secondly, there is the governing law. For the reasons given by Lord Clarke and Lord Mance, I agree that the law governing the alleged tort of deceit is English law. As for the alleged tort of conspiracy, this is less clear, because the conspiracy to commit the deceit was based on a common design allegedly formed in Russia. However, like Lord Mance, I am content to proceed on the basis that English law applies. In connection with the relevant governing law, therefore, it is clear that Arnold J and the Court of Appeal went wrong in holding that Russian law was the governing law.

101. It seems to me, however, that that error cannot, at least of itself, justify this court interfering with the Court of Appeal's decision, or, indeed, with Arnold J's decision, on the first question. That is because the Court of Appeal said in terms in para 166 of its judgment that it would have reached the same decision even if the law governing the deceit and conspiracy claims was English law, and Arnold J in his judgment appears to me to have taken the same view at his para 194.

102. Thirdly, there is an argument based on the jurisdiction clauses contained in the agreements, which VTB contends it entered into as a result of the alleged deceits and conspiracy. Clause 35 of the Facility Agreement ("clause 35") provided, in clause 35.1, that "the courts of England have nonexclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement", that no Party would argue that "the courts of England [were not] the most appropriate and convenient courts to settle" such disputes, but that clause 35.1 was "for the benefit of [VTB] only". Clause 35.3 entitled VTB "to refer any dispute which may arise out of or in connection with this Agreement to final and binding arbitration in London". The accompanying related agreements also contained jurisdiction clauses in favour of the English courts, and although their terms were not identical to clause 35, the differences are not significant for present purposes, so I shall confine my remarks to clause 35.

103. On behalf of VTB, Mr Mark Howard QC argued that the fact that the defendants had procured, by fraudulent misrepresentations, the entry of VTB into a contract containing a provision such as clause 35, was "a powerful pointer to England being the proper place to bring [a] claim" that it was induced by deceit to do so, particularly as the individual alleged to be responsible for the deceit was also involved in negotiating the contract.

104. At the end of para 187 of his judgment, Arnold J described clause 35 as "a pointer to England, but not a strong one given that the claim is a tort claim not a contract claim". The Court of Appeal did not in terms address this point, as the approval in their para 167 of Arnold J's balancing exercise only refers to his paras 188 and 189. However, by expressly agreeing with his approach, it seems unlikely that they did not take into account the point which he made at the end of his para 187.

105. In my view, Arnold J was right in his view that clause 35 was a factor in favour of VTB's case on the first question, but he was also right to say that it was not a particularly strong factor. As Rix J said in relation to a similar point in *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] 1 All ER (Comm) 237, 252, it would be "far-fetched" to suggest that a provision such as clause 35 could be invoked by VTB to require a claim it brings solely against non-parties to be heard in London, even if the claim relates to the agreement containing the clause. However, that is not a reason for concluding that clause 35 cannot be a factor, or, to use Arnold J's word, a pointer, in connection with the first question.

106. There may well be circumstances in which such a factor is a powerful one. An example is to be found in the decision of the New South Wales Court of Appeal in *Global Partners Fund Ltd v Babcock & Brown Ltd (in liquidation)* [2010] NSWCA 196 - see especially at paras 71 to 80. I do not consider that that decision helps VTB: for a number of reasons, it was a very different case.

107. In this case, it is true that, at least on the unchallenged evidence on behalf of VTB, Mr Malofeev was involved, and may have been instrumental in, negotiating the agreements in question, and he can therefore be said to have approved, or at least have had knowledge of, their terms, including clause 35. It is also true, again on VTB's case, that Mr Malofeev can be said to have encouraged VTB to enter into those agreements, which include clause 35. To that extent, it can come as no surprise to him that VTB wish to litigate a claim which, at least on its case, arises out of those agreements, in London.

108. However, clause 35 is not an exclusive jurisdiction provision: it merely gives VTB what is in effect an option to sue the other parties to the agreements in England in respect of any claim arising out of or in connection with those agreements. The present proceedings do not involve VTB suing any party to the agreements, although it may be that they could fairly be said to include any claim arising under the agreements. The fact that RAP was content to be sued under the agreements in England does not mean that Mr Malofeev would have been content to have been sued in tort here. The fact that VTB apparently wanted to have the right to sue RAP here does not mean that it would have wanted to have the same right against Mr Malofeev (e.g. RAP may have been believed to have assets here).

109. I accept that it would be different if VTB had a claim under the agreements against RAP to which its claim against Mr Malofeev was somehow connected. There is obvious force in Mr Hapgood QC's point that, if Mr Malofeev is to be treated as having had notice of clause 35 and its implications, it goes no further than helping VTB in suing him in this jurisdiction in proceedings which include a claim brought under the agreements against one or more of the parties to the agreements. However, I do not consider that the fact there are no such claims destroys VTB's reliance on clause 35 of any validity, but it severely weakens it.

110. I acknowledge the authority of Professor Briggs and the force of his views, as described by Lord Clarke at paras 221 and 222. However, I do not accept that Mr Malofeev "engineered" VTB entering into clause 35. There is no evidence that he even knew of its existence, and, anyway, it is plain from its terms that the clause was wanted by VTB and is purely for its benefit. In so far as it is said that Mr Malofeev "engineered" VTB entering into the agreement which happened to include clause 35, it seems to me unsafe to proceed on the assumption that Mr Malofeev was guilty of deceit: that would be the central substantive issue in these proceedings.

111. What I do accept is that the existence of the clause in an agreement, in which Mr Malofeev was in some respects involved (to use a neutral word) in negotiating, renders it hard for him to contend that England is an inappropriate forum for the proceedings which are connected with the agreement, but I do not see it going much further than that on its own. To hold otherwise would, I think, involve effectively treating Mr Malofeev as bound by the clause.

112. Finally, is this a case where the conclusion reached below on the first question was outside the ambit of permissible decisions as canvassed by Lord Bingham in *Lubbe* and quoted in para 92 above? In my view, it is not. While there is a powerful case for saying that England is the appropriate forum, as Lord Clarke's judgment shows, I think that it is also clear there is a powerful argument to the contrary, as is demonstrated by Lord Mance's judgment (supported by the reasoning of Arnold J and the Court of Appeal).

113. It is unnecessary to spend time on what is a hypothetical question, namely what decision I would have reached on this issue if I had been the appropriate decision-maker. It is sufficient for me to conclude, as I do, essentially for the reasons given more fully by Lord Mance and Lord Wilson, that Arnold J and the Court of Appeal each reached a conclusion on the first question which (i) they were respectively entitled to reach on the basis of applying the relevant principles to the facts of this case, and (ii) was not vitiated by any error, because, to the extent that there was any error, it did not invalidate the conclusion, both because

the error would not have caused them to change their conclusions and because that would have been a reasonable view to take.

The second issue: piercing the corporate veil: VTB's case

114. VTB seeks to amend its pleaded case to contend that Mr Malofeev and Marcap should be treated as being jointly and severally liable with RAP for breaches of two of the agreements, namely the Facility Agreement and the associated ISA ("the two agreements") and/or otherwise subject to remedies to enforce the two agreements.

115. On the documents, the parties to the two agreements were (i) RAP, (ii) "the original guarantors", namely, Migifa, owner of all the shares in RAP, and Brentville, owner of all the shares in Migifa, and (iii) VTB. It is (unsurprisingly) therefore common ground that Mr Malofeev was not party to either of the two agreements. However, VTB's contention is that it is entitled to "pierce the veil of incorporation" of RAP, as a result of which Mr Malofeev (and Marcap) should be held liable under the two agreements together with RAP and/or otherwise subject to remedies to enforce the two agreements.

116. According to VTB's proposed amended particulars of claim, as expanded in the written and oral argument before us, its case on this issue may be summarised as follows:

(i) Mr Malofeev controlled RAP and Nutritek;
(ii) RAP was specifically formed for the purpose of entering into the two agreements, which it duly did and thereby obtained the benefit of the loans of over US$225,050,000 made available to RAP by VTB thereunder;
(iii) The two agreements appeared to involve, and were misrepresented to VTB to involve, a loan to RAP to enable it to purchase the shares in certain Dairy Companies owned by Nutritek, whereas their true purpose, as Mr Malofeev knew, was to transfer those shares between the two companies at an inflated price;
(iv) In particular, Mr Malofeev was responsible for inducing VTB to enter into the two agreements by virtue of Nutritek's misrepresentations as to the control, trading performance, and value of the Dairy Companies, and, in particular, representing that they were not controlled by Mr Malofeev or Marcap;
(v) Mr Malofeev accordingly improperly used RAP "as the corporate vehicle to enter into" the two agreements, "and

obtain[ed] thereby" the loans, which "involved the fraudulent misuse of the company structure";

(vi) In particular, Mr Malofeev used RAP's "separate legal status to disguise the ownership and control ultimately exercised over RAP by [Mr Malofeev and Marcap]", which disguise duly misled VTB into believing that there was a genuine arm's length transaction at a genuinely negotiated price;

(vii) In these circumstances, "the corporate veil of RAP should be lifted, exposing … Mr Malofeev … as the puppeteer … behind it to remedies to enforce the terms of the [two agreements]", so that Mr Malofeev is "jointly and severally liable with RAP" under the two agreements "in respect of VTB's losses".

117. For Mr Malofeev, it was contended that this line of argument is bound to fail on two alternative grounds. The first is that we should hold that, whatever has been said about it in previous cases, the court cannot in fact pierce the corporate veil, and that the cases which suggest it can are wrong, although the decisions in those cases may often be justified on another basis. The second argument is that, even if the court can in principle pierce the veil, it cannot do so in this case, because VTB's argument represents an illegitimate and unprincipled extension of the circumstances in which the veil can be pierced.

The second issue: piercing the corporate veil: the principle of piercing the veil

118. I turn first to consider the argument that there are no circumstances in which the court should pierce, or lift, the corporate veil. The terms "piercing" and "lifting" appear throughout the authorities, sometimes interchangeably. As Toulson J observed in *Yukong Line Ltd of Korea v Rendsburg Investments Corpn of Liberia (No 2)* [1998] 1 WLR 294, 305, "it may not matter what language is used as long as the principle is clear; but there lies the rub". Staughton LJ in *Atlas Maritime Co SA v Avalon Maritime Ltd (No 1)* [1991] 4 All ER 769, 779G, expressly separated the two, on the basis that "pierc[ing]…is reserve[d] for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders", whereas "lift[ing] … [is] to have regard to the shareholding in a company for some legal purpose". In *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam) [2009] 1 FLR 115, a case which included a claim that a company was no more than one man's alter ego, Munby J said, at para 150, that "in this context the expressions are synonymous".

119. For present purposes, I shall use the phrase "piercing" in preference to "lifting". It is the more familiar expression and it is the expression which all counsel have used. It is unnecessary to decide whether, in truth, there is a difference in this context between "piercing" and "lifting" the corporate veil.

120. We were referred to a number of cases where courts have either granted relief on the basis of piercing the corporate veil, or where courts have proceeded on the assumption, or concluded, that there is power to do so. The only case in that connection in the House of Lords, or Supreme Court, to which we were referred, was *Woolfson v Strathclyde Regional Council* 1978 SLT 159, a case where, on the facts, the House of Lords had no difficulty in rejecting an argument that the corporate veil could be pierced. At 1978 SLT 159, 161, Lord Keith suggested that the court could only take such a course "where special circumstances exist indicating that [the involvement of the company] is a mere façade concealing the true facts".

121. There is obvious attraction in the proposition that the court can pierce the veil of incorporation on appropriate facts, in order to achieve a just result. However, the spirited and sustained attack mounted against the proposition by Mr Michael Lazarus, who appeared for Marshall Capital Holdings Ltd, is worthy of serious consideration. The brief discussion of the principle in *Woolfson* does not justify the contention that it was somehow affirmed or approved by the House: Lord Keith's remarks were obiter, and the power of the court to pierce the corporate veil does not appear to have been in issue in that case. The most that can be said about *Woolfson* from the perspective of VTB is that the House was prepared to assume that the power existed.

122. The starting point for the argument that the principle does not exist is the well known decision in *Salomon v A Salomon & Co Ltd* [1897] AC 22. There is great force in the argument that that case represented an early attempt to pierce the veil of incorporation, and it failed, pursuant to a unanimous decision of the House of Lords, not on the facts, but as a matter of principle. Thus, at 30-31, Lord Halsbury LC said that a "legally incorporated" company "must be treated like any other independent person with its rights and liabilities appropriate to itself …, whatever may have been the ideas or schemes of those who brought it into existence". He added that it was "impossible to say at the same time that there is a company and there is not."

123. The notion that there is no principled basis upon which it can be said that one can pierce the veil of incorporation receives some support from the fact that the precise nature, basis and meaning of the principle are all somewhat obscure, as are the precise nature of circumstances in which the principle can apply. Clarke J in *The Tjaskemolen* [1997] 2 Lloyd's Rep 465, 471 rightly said that "[t]he cases have not worked out what is meant by 'piercing the corporate veil'. It may not always mean the same thing" (and to the same effect, see *Palmer's Company Law*, para 2.1533). Munby J in *Ben Hashem* seems to have seen the principle as a remedial one, whereas Sir Andrew Morritt V-C in *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177 appears to have treated the principle as triggered by the finding of a "façade".

124. The “façade” mentioned by Lord Keith is often regarded as something of a touchstone in the cases – e.g. per Munby J in *Ben Hashem*, para 164, and per Sir Andrew Morritt V-C in *Trustor*, para 23. Words such as “façade”, and other expressions found in the cases, such as “the true facts”, “sham”, “mask”, “cloak”, “device”, or “puppet” may be useful metaphors. However, such pejorative expressions are often dangerous, as they risk assisting moral indignation to triumph over legal principle, and, while they may enable the court to arrive at a result which seems fair in the case in question, they can also risk causing confusion and uncertainty in the law. The difficulty which Diplock LJ expressed in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, 802, as to the precise meaning of “sham” in connection with contracts, may be equally applicable to an expression such as “façade”.

125. Mr Lazarus argued that in all, or at least almost all, the cases where the principle was actually applied, it was either common ground that the principle existed (*Gilford Motor Co Ltd v Horne* [1933] Ch 935, *Re H (restraint order: realisable property)* [1996] 2 BCLC 500, and *Trustor*) and/or the result achieved by piercing the veil of incorporation could have been achieved by a less controversial route - for instance, through the law of agency (*In re Darby, Ex p Brougham* [1911] 1 KB 95, *Gilford*, and *Jones v Lipman* [1962] 1 WLR 832), through statutory interpretation (*Daimler Company Ltd v Continental Tyre and Rubber Company (Great Britain) Ltd* [1916] 2 AC 307, *Merchandise Transport Ltd v British Transport Commission* [1962] 2 QB 173, *Wood Preservation Ltd v Prior* [1969] 1 WLR 1077, and *Re A Company* [1985] BCLC 333), or on the basis that, as stated by Lord Goff in *Goss v Chilcott* [1996] AC 788, 798, money due to an individual which he directs to his company is treated as received by him (*Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734, and *Trustor*).

126. In summary, therefore, the case for Mr Malofeev is that piercing the corporate veil is contrary to high authority, inconsistent with principle, and unnecessary to achieve justice.

127. I see the force of this argument, but there are points the other way. I am not convinced that all the cases where the court has pierced the veil can be explained on the basis advanced by Mr Lazarus. Further, as Mr Howard QC said, the fact is that those cases were decided on the basis of piercing the veil. More generally, it may be right for the law to permit the veil to be pierced in certain circumstances in order to defeat injustice. In addition, there are other cases, notably *Adams v Cape Industries plc* [1990] Ch 433, where the principle was held to exist (albeit that they include *obiter* observations and are anyway not binding in this court). It is also difficult to explain the first instance decision in *Kensington International Ltd v Republic of the Congo* [2005] EWHC 2684 (Comm), [2006] 2 BCLC 296 on any basis other than the principle (but I am not at all sure that the case was rightly decided – see *Continental Transfert Technique Ltd v Federal Government of*

Nigeria [2009] EWHC 2898 (Comm), paras 27-29). Further, the existence of the principle is accepted by all the leading textbooks – see *Palmer op. cit*, *Gore-Browne on Companies* at paras 7[3] to 7[6], Gower and Davies on *Principles of Modern Company Law* (8th ed) at paras 8-5 to 8-14, and *Farrar's Company Law* (4th ed), pp 69-78.

128. In answer to the contention that the approach of the courts to the issue of piercing the veil is unprincipled, there is real force, at least on the face of it, in the fact that it cannot be invoked merely where there has been impropriety. As Munby J put it in *Ben Hashem*, paras 163-164, "it is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is, (mis)use of the company by them as a device or façade to conceal their wrongdoing … at the time of the relevant transaction(s)".

129. In its recent decision in *La Générale des Carrières et des Mines v F G Hemisphere Associates LLC* [2012] UKPC 27, para 24, the Judicial Committee of the Privy Council, in a judgment given by Lord Mance, was prepared to assume that the appellant was right in contending that it was open to a court in this jurisdiction to pierce the corporate veil, but it is to be noted that this was not challenged by the respondent. In para 27, reference was made to *Case concerning Barcelona Traction, Light and Power Company, Ltd* [1970] ICJ 3, in which, it was said,

> "[T]he International Court of Justice referred (para 56) to municipal law practice to lift the corporate veil … 'for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations'".

However, at para 27, Lord Mance pointed out that *Barcelona Traction* concerned "international legal considerations, indicating that there may not always be a precise equation between factors relevant to the lifting of the corporate veil under domestic and international law."

130. In my view, it is unnecessary and inappropriate to resolve the issue of whether we should decide that, unless any statute relied on in the particular case expressly or impliedly provides otherwise, the court cannot pierce the veil of incorporation. It is unnecessary, because the second argument raised on behalf of Mr Malofeev, to which I shall shortly turn, persuades me that VTB cannot succeed on this issue. It is inappropriate because this is an interlocutory appeal, and it

would therefore be wrong (absent special circumstances) to decide an issue of such general importance if it is unnecessary to do so.

The second issue: piercing the corporate veil: why it cannot succeed in this case

131. I therefore approach this question in the same way as the Court of Appeal, namely by considering whether, assuming in VTB's favour that the court can pierce the veil of incorporation on appropriate facts, the basis on which VTB seeks to pierce the veil can be justified in the present case. I do so on the basis that this issue is to be resolved by reference to English law. It seems to me, however, that there may be a choice of law question to be addressed in cases which concern the piercing of the veil of a foreign incorporated company. That question is whether the proper law governing the piercing of the corporate veil is the *lex incorporationis*, the *lex fori*, or some other law (for example, the *lex contractus*, where the issue concerns who is considered to be party to a contract entered into by the company in question). The ultimate conclusion may be that there is no room for a single choice of law rule to govern the issue: see Tham "Piercing the corporate veil: searching for appropriate choice of law rules" [2007] LMCLQ 22, 27. However, given that it has been common ground throughout these proceedings that the issue is to be resolved pursuant to English law, it is inappropriate to say more about this issue.

132. In so far as VTB invokes the principle of piercing the veil of incorporation, its case involves what, at best for its point of view, may be characterised as an extension to the circumstances where it has traditionally been held that the corporate veil can be pierced. It is an extension because it would lead to the person controlling the company being held liable as if he had been a co-contracting party with the company concerned to a contract where the company was a party and he was not. In other words, unlike virtually all the cases where the court has pierced the corporate veil, VTB is claiming that Mr Malofeev should be treated as if he were, or had been, a co-contracting party with RAP under the two agreements, even though neither Mr Malofeev nor any of the contracting parties (including VTB) intended Mr Malofeev to be a party.

133. The notion that the principle can be extended to such a case receives no support from any case save for a very recent decision of Burton J, *Antonio Gramsci Shipping Corporation v Stepanovs* [2011] EWHC 333 (Comm), [2011] 1 Lloyd's Rep 647 (which he followed in his later decision in *Alliance Bank JSC v Aquanta Corporation* [2011] EWHC 3281 (Comm) [2012] 1 Lloyd's Rep 181, which was considered by the Court of Appeal at [2012] EWCA Civ 1588). None of the other decisions relied on by VTB in this connection is, on analysis, of assistance to its case.

134. In *Gilford*, Mr Horne had undertaken not to compete with his former employer, and a company, in which only he and his wife were shareholders, and which he formed after leaving his employment, was enjoined from competing. He effectively broke his undertaking by trading through the company, in the same way as if it had been carrying on the competing business through his wife – as indeed had happened in *Smith v Hancock* [1894] 2 Ch 377, 385, a case relied on by the Court of Appeal in *Gilford.* Thus, the decision in *Gilford* had nothing to do with the fact that a company was involved, and therefore, as a matter of logic, the decision cannot have been based on piercing the corporate veil – a point made by Toulson J in *Yukong Line* at 308, and rightly accepted by Arnold J and the Court of Appeal in this case.

135. The same point (as was said in *Yukong Line*) applies to *Jones v Lipman*, which I do not find an entirely easy case. After agreeing to sell a property to a purchaser, the vendor sold the same property to a company owned by him and his wife, and the purchaser obtained an order for specific performance against the company. On the judge's reasoning, it would have equally been entitled to do so if, instead of the company, the property had been transferred to the vendor's wife. Another view of *Jones* is that the sale by the vendor to the company was treated as a sham transaction.

136. In both *Gencor* and *Trustor*, the court pierced the corporate veil in order to impose liability on a company, effectively owned and controlled by the wrongdoer, for money which he had misappropriated from the claimant and diverted to the company. There was no question of the wrongdoer being treated as contractually liable under a contract to which the company, rather than he, was a party. Even the doubtful decision in *Kensington* did not involve going so far as to hold that the person sheltering behind the veil was liable as if he was a contracting party under a contract entered into by the company.

137. The fact that there has been no case (until *Gramsci*) where the power to pierce the corporate veil has been extended in the way for which VTB contends in these proceedings does not necessarily mean that VTB's case, in so far as it is based on piercing the veil, must fail. However, given that the principle is subject to the criticisms discussed above, it seems to me that strong justification would be required before the court would be prepared to extend it. Once one subjects the proposed extension to analysis, I consider that it is plain that it cannot be sustained: far from there being a strong case for the proposed extension, there is an overwhelming case against it.

138. First, it is not suggested by VTB that any of the other contracting parties under the two agreements is not liable. Indeed, as mentioned above, VTB's proposed pleaded case is that Mr Malofeev is "jointly and severally liable with

RAP". Even accepting that the court can pierce the corporate veil in some circumstances, the notion of such joint and several liability is inconsistent with the reasoning and decision in *Salomon.* A company should be treated as being a person by the law in the same way as a human being. The fact that a company can only act or think through humans does not call that point into question: it just means that the law of agency will always potentially be in play, but, it will, at least normally, be the company which is the principal, not an agent. On VTB's case, if the agency analogy is relevant, the company, as the contracting party, is the quasi-agent, not the quasi-principal.

139. Subject to some other rule (such as that of undisclosed principal), where B and C are the contracting parties and A is not, there is simply no justification for holding A responsible for B's contractual liabilities to C simply because A controls B and has made misrepresentations about B to induce C to enter into the contract. This could not be said to result in unfairness to C: the law provides redress for C against A, in the form of a cause of action in negligent or fraudulent misrepresentation.

140. In any event, it would be wrong to hold that Mr Malofeev should be treated as if he was a party to an agreement, in circumstances where (i) at the time the agreement was entered into, none of the actual parties to the agreement intended to contract with him, and he did not intend to contract with them, and (ii) thereafter, Mr Malofeev never conducted himself as if, or led any other party to believe, he was liable under the agreement. That that is the right approach seems to me to follow from one of the most fundamental principles on which contractual liabilities and rights are based, namely what an objective reasonable observer would believe was the effect of what the parties to the contract, or alleged contract, communicated to each other by words and actions, as assessed in their context – see e.g. *Smith v Hughes* (1871) LR 6 QB 597, 607.

141. In his argument, Mr Howard QC relied by analogy with the law relating to undisclosed principals. In my view, the analogy tells against VTB's argument. The existence of the undisclosed principal rule has long been regarded as an anomaly, as discussed in *Bowstead & Reynolds on Agency*, 19th ed (2010), para 8-070, and as observed by Dillon LJ in *Welsh Development Agency v Export Finance Co Ltd* [1992] BCLC 148, 173. As the Court of Appeal said in this case at para 89, it would be inappropriate to extend an anomaly – save where it would be unjust and unprincipled not to do so. To adapt what Lord Hoffmann said in *OBG Ltd v Allan* [2007] UKHL 21, [2008] AC 1, paras 103 and 106, "an anomaly created by the judges to solve a particular problem" is "an insecure base" on which to justify an extension to a principle, especially when that principle can itself be said to be anomalous.

142. Quite apart from this, it seems to me that the facts relied on by VTB to justify piercing the veil of incorporation in this case do not involve RAP being used as "a façade concealing the true facts". In my view, if the corporate veil is to be pierced, "the true facts" must mean that, in reality, it is the person behind the company, rather than the company, which is the relevant actor or recipient (as the case may be). Here, on VTB's case, "the true facts" relate to the control, trading performance, and value of the Dairy Companies (if one considers the specific allegations against Mr Malofeev), or to the genuineness of the nature of the underlying arrangement (which involves a transfer of assets between companies in common ownership). Neither of these features can be said to involve RAP being used as a "façade to conceal the true facts".

143. It was suggested, however, by Mr Howard QC that the case against Mr Malofeev involves him "abusing the corporate structure", and that that is sufficient to justify piercing the corporate veil. However, in my view, abuse of the corporate structure (whatever that expression means) adds nothing to the debate, at least in this case. It may be another way of describing use of the company as a façade to conceal the true facts (in which case it adds nothing to Lord Keith's characterisation in *Woolfson*), or it may be an additional requirement before the corporate veil will be pierced: otherwise, it seems to me that it would be an illegitimate extension of the circumstances in which the veil can be pierced.

144. It is true that in many civil law systems, abuse of rights is a well recognised concept, and it may be appropriate for a domestic court to apply such a principle in relation to some areas of EU law. However, it was not suggested to us that it should be applied as a new or separate ground in domestic law for treating Mr Malofeev as contractually liable to VTB, or that it would assist VTB in this case.

145. Accordingly, in agreement with the Court of Appeal and for substantially the same reasons, I consider that VTB's contention represents an extension to the circumstances in which the court will pierce the corporate veil, and on analysis it is an extension which is contrary to authority and contrary to principle.

146. The proposed extension is all the more difficult to justify given that it is not needed to enable VTB to seek redress from Mr Malofeev. It is clear that, if VTB establishes that it was induced to enter into the agreements by the fraudulent statements which he is alleged to have made, then Mr Malofeev will be liable to compensate VTB. The measure of damages may be different, but that is not a particularly attractive reason for extending the principle in a new and unprincipled way. And I am not at all attracted by the notion that the principle should be invoked simply to enable VTB to justify the proceedings being heard in this jurisdiction, if they otherwise could not be. That would be precious close to its application being permitted to pull itself up by its own bootstraps.

147. It follows from this analysis that I doubt that the decision in *Gramsci* can be justified, at least on the basis of piercing the corporate veil. In agreement with the Court of Appeal and Arnold J, I think that the reasoning in that case involved a misinterpretation of the basis of the decisions in *Gilford* and *Jones.* It seems to me that the conclusion in *Gramsci* was driven by an understandable desire to ensure that an individual who appears to have been the moving spirit behind a dishonourable (or worse) transaction, action, or receipt, should not be able to avoid liability by relying on the fact that the transaction, action, or receipt was effected through the medium (but not the agency) of a company. But that is not, on any view, enough to justify piercing the corporate veil for the purpose of holding the individual liable for the transaction, action, or receipt, especially where the action is entering into a contract.

148. For these reasons, I agree with the Court of Appeal in concluding that, assuming that there is jurisdiction to pierce the corporate veil on appropriate facts, VTB's proposed pleaded case does not give rise to arguable grounds for contending that this jurisdiction could be invoked in the present case. I would therefore refuse VTB permission to amend its pleaded case to raise such a claim.

Conclusion

149. I would therefore dismiss VTB's appeal on both main issues.

150. I have referred to the issues I have been discussing as the main issues, because there is another series of issues relating to a freezing order which VTB obtained. Following its discharge by Arnold J, VTB wishes this freezing order to be reinstated. There is also a temporary freezing order, which VTB obtained pending the determination of this appeal. In the light of the fact that this appeal is being dismissed, it seems to me clear that the discharged freezing order must remain discharged and the temporary freezing order must now be discharged as well. I should add that I agree with what Lord Wilson says about the freezing orders.

LORD WILSON

151. I agree with Lord Mance and Lord Neuberger that the appeal should be dismissed.

152. As their judgments, and, on the other hand, those of Lord Clarke and Lord Reed, well demonstrate, the rival arguments in relation to forum are evenly balanced.

153. VTB has three main points:

(a) The location of the alleged torts in England. It is worthwhile to remember, however, that, in one sense, the bringing of the transactions into England was pure chance. In July 2007 VTB Moscow informed Mr Malofeev and MarCap that the proposed lender would be either itself or VTB; and in October 2007 it informed them that it would be VTB. They had no objection; but the placement of the lending into the hands of its English subsidiary was effected entirely at the election of, and for the convenience of, VTB Moscow.

(b) The English jurisdiction clause in the facility agreement and indeed also in the interest rate swap agreement. If Mr Malofeev controlled the borrowing party to the agreements, namely RAP, and so can be considered responsible for its contractual concession that VTB should have the right to demand that disputes arising out of them be resolved in the courts of England, he can hardly complain if allegations of his and his companies' fraudulent inducement of VTB to enter into them are also resolved here. But two riders fall to be attached. The first is whether the court can at this stage proceed on the basis that Mr Malofeev controlled RAP. The court must not for this purpose assume what VTB needs to prove; yet the fact is that, while not admitting control of RAP, Mr Malofeev has, to date, not actively challenged it. The second is that the test to be applied pursuant to the decision in the *Spiliada* case, [1987] AC 460, mandates a much wider inquiry than into whether Mr Malofeev would have no ground for complaint about the continuation of the proceedings in England.

(c) The government by English law of VTB's claims in tort, as held unanimously by this court and as explained in judgments above with which I agree. A spectre of considerable practical inconvenience is raised around the receipt by a Russian judge of evidence of English law and around his application of it to such facts as he were to find. On the other hand the legal framework of VTB's case does not appear to be complex or controversial and Arnold J was entitled to conclude that the key issues in the case were likely to be factual rather than legal.

154. Although, therefore, I discern a practical element in the third of VTB's main points, I have no doubt that, over all, considerations of practicality militate strongly in favour of a Russian forum. The apparently relevant witnesses are Russian, speak Russian and seem almost entirely to be resident in Russia and so beyond the reach of an English witness summons; and the relevant documentation, in particular relating to both the actual and the represented profitability of the dairy companies, was written in Russian.

155. On the one hand, therefore, there are VTB's points, which primarily go to theory, to policy and, yes, perhaps to a limited extent to justice. On the other hand there are the defendants' points, which primarily go to practicality.

156. The forum issue required Arnold J not (in my view) to exercise a discretion but, rather, to reach an evaluative judgment upon whether, in the light of these and the many other points pressed upon him by each side, England was clearly the more appropriate forum. "[T]he appellate court should be slow to interfere" (Lord Goff in the *Spiliada* case, at p 465); and I agree with Lord Mance at para 68 and with Lord Neuberger at para 96 that the errors which the Court of Appeal identified in the judgment of Arnold J (in particular his adoption of the two-part test apt to an application for stay) were, on analysis, of materiality insufficient to justify a re-evaluation of its own. Furthermore, notwithstanding its own error about the governing law of the torts, alongside which, however, one must weigh its assertion that an English governing law would not have led it to a different conclusion, I agree with Lord Neuberger's alternative conclusion at para 98 that there are no grounds for interfering with the Court of Appeal's own evaluative conclusion.

157. To be honest, a disposal of the forum part of the appeal on the above basis is, in the light of this court's intended function in the resolution of controversial and important issues of law, a banal disposal; and, in retrospect, a question arises whether it is appropriate for there to have been a massive second appeal to this court on the forum issue. In its notice of appeal VTB identified the requisite issue of general public importance relative to the issue in one sentence: "the appellant says that if a defendant has committed a wrong in England, there is a presumption, and a strong one, that he ought to answer for that wrong in England". But, while he was careful not entirely to abandon his preference for the language of presumption, Mr Howard conceded, early in his opening address, that it was irrelevant whether such was a presumptive position, a starting point or a prima facie conclusion; a little later in his address, he added that the issue was not really about a label, such as that of presumption, but about approach; and he scarcely pressed the difficult suggestion that there was anything in the jurisprudence - even in *The Albaforth*, [1984] 2 Lloyd's Rep 91 - to raise a formal, legal presumption that the forum should follow the location of the tort. I am doubtful whether the committee would have granted permission to appeal on the forum issue if it had realised that VTB's

case would develop into little more than an invitation to re-evaluate all the relevant factors for and against the English forum.

158. VTB's application for permission to amend its particulars of claim so as to include claims against Mr Malofeev and the two MarCap companies as additional parties to the facility and interest rate swap agreements logically falls for consideration before that of the forum issue. For, had it been granted, the jurisdiction clauses in the agreements would have been directly in play. VTB frankly concedes that its primary purpose in making the proposed claims in contract was, by reference to such clauses, to establish the English jurisdiction pursuant to article 23(1) of Council Regulation EC 44/2001 (the Judgments Regulation); and that its secondary purpose was thereby to be enabled to claim more substantial sums, particularly by way of interest, than would be payable as damages in tort. In the event, however, for the reasons given by Lord Neuberger in paras 126 to 148, the Court of Appeal was right to dismiss VTB's appeal against the refusal of Arnold J to permit the amendment: for there was no good arguable case that the three specified defendants could be unveiled as additional parties to the agreements with VTB. In that this court welcomes blue sky thinking, I do not criticise Mr Lazarus for his over-arching attempt to persuade it that English law recognises no principle that the corporate veil may ever be lifted. In my view, however, and notwithstanding the difficulty of being able to define within one sentence the circumstances in which the law will – perhaps – lift the corporate veil, such was a highly ambitious submission. But this is not the place at which to embark on an attempted subjection of it to critical examination.

159. In that, by a majority, VTB's appeal is to be dismissed, the worldwide freezing order against Mr Malofeev must fall to be discharged. But the continuation of the order to date represents a highly unsatisfactory state of affairs. The order was first made, without notice, in August 2011 and was continued, on notice, in September 2011. On 29 November 2011, in the light of his conclusion in favour of the Russian forum, Arnold J declined further to continue the order, save for one week in order to enable VTB to approach the Court of Appeal. But importantly, as Lord Clarke has explained in para 163, Arnold J also ruled that, even had he allowed the English proceedings to continue by declining to set aside the order for service out of the jurisdiction, it would have been wrong, for each of two reasons, for the freezing order to continue. VTB, to whom Arnold J had granted permission to appeal against his refusal to permit the amendment, secured permission from the Court of Appeal also to appeal against his decision in relation to forum and his independent refusal to continue the freezing order; and, on a holding basis, the court continued that order until determination of the appeal. In the light of its dismissal of VTB's appeal in relation to forum, the Court of Appeal concluded that there was no basis on which the freezing order could continue in any event; and, although it expressed doubts about the first reason given by Arnold J for his independent refusal to continue the freezing order, it did not address his

second reason and made no order on that part of VTB's appeal. It continued the freezing order for ten days only in order to enable VTB to approach this court, which further continued it until its determination of this appeal.

160. In the light of this court's dismissal, by a majority, of the appeal in relation to forum, it can now be seen that Mr Malofeev has continued to be subject to a worldwide freezing order for some 14 months beyond the time when it was proper for such an order to have continued. For in November 2011 Arnold J rightly decided that the proceedings should take place in Russia; and the freezing order should then have expired. It was extended only because of the pendency of two successive appeals which can now be seen both to have failed. Such a state of affairs is bad enough. But what makes it worse is that, as I have explained, Arnold J also ruled as long ago as November 2011 that, irrespective of its dependence on the continuation of the English proceedings, the freezing order should not be continued; and his ruling has not been set aside by the Court of Appeal. In retrospect the Court of Appeal should have determined VTB's appeal against that ruling. Had it, for example, dismissed its appeal, this court would be unlikely to have permitted it to appeal against the dismissal and so the freezing order would no doubt at last have come to an end. One cannot quarrel with the logic behind the conventional continuation of a freezing order pending an appeal against a refusal to make an order upon its continued existence depends. But what turns out to have been the protracted wrongful continuation of the freezing order is another indication of the inappropriateness of a further appeal to this court in circumstances such as the present. The degree of economic inhibition caused to a person in the position of Mr Malofeev by a worldwide freezing order made in England remains to be seen. At first sight, however, he is entitled to complain that it was an oppressive restraint on his economic activities. Whether he is correct to say that it has caused considerable prejudice to him will no doubt be the subject of inquiry in his application, already issued but so far stayed, for VTB to be ordered to compensate him for his losses pursuant to its cross-undertaking attached to the freezing order.

LORD CLARKE (dissenting)

Introduction

161. In this action the appellant claimant, VTB Capital plc ("VTB"), which was formerly called VTB Bank Europe plc, sought and obtained permission to serve proceedings out of the jurisdiction on the defendant respondents on the ground that the defendants had committed the torts of deceit and conspiracy in England. Save for the third defendant, which has not been served with the proceedings, the defendants applied to have that permission set aside on the ground that VTB had

failed to show that England was in all the circumstances clearly and distinctly the appropriate forum to determine the dispute. That application succeeded before Arnold J ("the judge"): [2011] EWHC 3107 (Ch). VTB's appeal to the Court of Appeal failed: [2012] EWCA Civ 808. The Supreme Court subsequently gave permission to appeal on that issue, which has (not entirely correctly) been described in argument as the jurisdiction issue. That is the first issue in this appeal.

162. The second issue arises out of an application made by VTB to amend its particulars of claim to add a claim for breach of contract. Its case involves a consideration of the principles relevant to what is sometimes called piercing the corporate veil. Both the judge and the Court of Appeal refused that application. Although both courts accepted that it is possible in some circumstances to pierce the corporate veil, they both held that VTB had no arguable case that this is such a case. Under this head the defendants seek to uphold the decision of the Court of Appeal, not only on the particular facts, but also on the basis that there are no circumstances in which the court can pierce the corporate veil.

163. The third issue arises out of a world wide freezing order ("WFO") granted to VTB against Mr Malofeev on 5 August 2011 by Roth J. Mr Malofeev applied to discharge the order on the grounds (a) that there was no risk of dissipation of assets and (b) that there had been material non-disclosure before Roth J. Arnold J subsequently declared that the WFO should be discharged on the ground that the court had refused to exercise jurisdiction over the claim. He also said that he would in any event have discharged and refused to re-grant the WFO on the grounds relied upon by Mr Malofeev. The WTO was however renewed pending an appeal to the Court of Appeal and subsequently to this court.

Jurisdiction

Service out of the jurisdiction - the principles

164. The relevant principles are not in dispute. They have been stated and restated many times. They were correctly stated in the Court of Appeal in this case by Lloyd LJ, with whom Rimer and Aikens LJJ agreed, at paras 98 to 101. Lloyd LJ put them thus in paras 99 and 100:

> "99. … The three basic principles were recently restated by Lord Collins of Mapesbury in giving the advice of the Privy Council in *AK Investment CJSC v Kyrgyz Mobile Tel Ltd* [2011] UKPC 7, 1 CLC 205 at paragraphs 71, 81 and 88. They can be summarised as follows: first, the claimant must satisfy the court that, in relation to

> the foreign defendant to be served with the proceedings, there is a serious issue to be tried on the merits of the claim, i.e. a substantial question of fact or law or both. This means that there has to be a real, as opposed to a fanciful, prospect of success on the claim. Secondly, the claimant must satisfy the court that there is a good arguable case that the claim against the foreign defendant falls within one or more of the classes of case for which leave to serve out of the jurisdiction may be given. These are now set out in paragraph 3.1 of Practice Direction 6B. 'Good arguable case' in this context means that the claimant has a much better argument than the foreign defendant. Further, where a question of law arises in connection with a dispute about service out of the jurisdiction and that question of law goes to the existence of the jurisdiction (eg whether a claim falls within one of the classes set out in paragraph 3.1 of Practice Direction 6B), then the court will normally decide the question of law, as opposed to seeing whether there is a good arguable case on that issue of law.
>
> 100. Thirdly, the claimant must satisfy the court that in all the circumstances England is clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction. This requirement is reflected in rule 6.37(3) of the CPR, which provides that 'The court will not give permission [to serve a claim form out of the jurisdiction on any of the grounds set out in paragraph 3.1 of Practice Direction 6B] unless satisfied that England and Wales is the proper place in which to bring the claim'".

The facts

165. The underlying facts and issues under this head are set out in the agreed statement of facts and issues ("the SFI"), from which I can take the salient events.

166. VTB's case is that the key step in the fraud was VTB's advancing a sum of US$195,000,000 in London to the account of a borrower in London, which was in turn paid to a seller of a business to its account in London, all done subject to a loan agreement and other related agreements governed by English law and containing English jurisdiction clauses. VTB claims that it has suffered a loss in excess of US$185,000,000.

167. The judge and the Court of Appeal both held that VTB has a good arguable case that its claims are claims in tort within paragraph 3.1(9)(a) of CPR Part 6, Practice Direction 6B, on the ground that damage was sustained within the jurisdiction and that VTB has a good arguable case in tort against Mr Malofeev. However they held that permission to serve out of the jurisdiction should be set

aside because VTB has failed to show that England was clearly or distinctly the appropriate forum to determine the disputes. The first issue in this appeal is whether they were entitled so to hold.

168. VTB's case on the facts may be summarised in this way. VTB is a bank incorporated and registered in England. It is a member of the London Stock Exchange, and it is authorised and regulated by the Financial Services Authority for the conduct of investment business in the United Kingdom. It is majority owned by JSC VTB Bank ("VTB Moscow"), which is a state-owned bank. It is one of three strategic business arms of the VTB Group, the others being the corporate and retail businesses. It entered into a facility agreement, dated 23 November 2007 ("the facility agreement"), with a Russian company, Russagroprom LLC ("RAP"). Pursuant to the facility agreement, sums totalling US$225,050,000 were advanced to RAP, primarily to enable RAP to buy six Russian dairy companies and three associated companies ("the dairy companies") from the first respondent ("Nutritek"), a company registered in the British Virgin Islands ("BVI"). After making three interest payments (and no payments of capital), RAP defaulted on the loan in November 2008. VTB's case is that the value of the security provided for the loan was no more than a figure in the region of US$32m to US$40m.

169. VTB's case is that it was induced in London to enter into the facility agreement and an accompanying interest rate swap agreement, by misrepresentations made by Nutritek, for which the other respondents are jointly and severally liable. The two alleged misrepresentations were: first, that RAP and Nutritek were not under common control, and second, that the value of the dairy companies was much greater than their true worth. It is VTB's case that the misrepresentations were fraudulent. The ostensible primary purpose of the facility agreement was to fund the acquisition of the dairy companies from Nutritek by RAP. RAP entered into a Share Purchase Agreement ("SPA") with Nutritek dated 27 November 2007, whereby RAP purchased shares in a newly incorporated BVI company, Newblade Ltd ("Newblade"), which in turn owned the dairy companies.

170. VTB put before the judge a structure chart, setting out in a diagram the complex web of offshore companies through which, on VTB's case, Mr Malofeev ultimately controlled each of Nutritek, the second respondent ("Marcap BVI"), the third defendant ("Marcap Moscow"), and RAP. Marcap Moscow has not been served with the proceedings, and has not taken part in any of the hearings to date. Mr Malofeev is an international businessman who resides in Moscow. The Court of Appeal found that there was a good arguable case that Mr Malofeev "operated a complex web of companies in a number of jurisdictions". It is VTB's case that he was at all material times the controller and a principal beneficial owner of the BVI companies, Nutritek and Marcap BVI, as well as Marcap Moscow and RAP. RAP was incorporated in Russia on 21 May 2007 as a special purpose vehicle. In

November 2007 its immediate parent company was Migifa Holdings Ltd ("Migifa"), a company incorporated in Cyprus. Migifa's parent company was Brentville Ltd ("Brentville"), a company incorporated in the BVI. It is VTB's case that RAP was ultimately owned and controlled by Mr Malofeev, through a web of offshore companies. As the judge found at para 59, "this has not been the subject of challenge" by Mr Malofeev, who has advanced no positive case on the issue of the ultimate ownership and control of RAP. See also the Court of Appeal, at para 34.

171. It is VTB's case that, in July 2007 in Moscow, Mr Malofeev personally introduced the VTB Group to the scheme, whereby Nutritek sold its interests in the dairy companies to RAP under the SPA. He stated that a decision had been taken to sell Nutritek's interest in the dairy business and that a purchaser had been identified. He said that a purchaser would have to find banking facilities in order to make the purchase. Mr Tulupov of VTB Moscow was the project manager in respect of the proposed transaction, where his role included liaising with VTB in respect of the project. At an early stage, it was contemplated that either VTB Moscow or VTB would become the lender in connection with the intended transaction. On 18 July 2007, he instructed the London office of Dewey LeBoeuf, Greene & Macrae ("DLGM") in relation to the proposed transaction. On the next day, a conference call took place between representatives of VTB Moscow, VTB (Marina Bragina, in London) and Marcap Moscow (Mr Alexander Provotorov and Mr Yury Leonov).

172. It is apparent from a draft term sheet of 8 October 2007 that by early October that year, the proposed structure of the transaction was that the lender was to be VTB (funded by a participation agreement with VTB Moscow) and the borrower was to be RAP. It is VTB's case that, from about this time it was VTB which was to be the particular target for the fraud. The loan amount was to be in excess of US$220m towards an acquisition cost of US$250m. Work started to prepare the documentation for the transaction. The facility agreement was to be governed by English law and VTB was to be the lender in the transaction. Mr Tulupov explains in his statement that the attraction of the lender being VTB was that (i) VTB in the London market was able to provide more sophisticated lending structures than VTB Moscow (owing to internal Russian banking requirements) and (ii) English law offered more protection in the case of default.

173. On 31 October 2007, VTB Moscow's Credit Committee approved the proposed transaction. It is VTB's case that, separately from this, and in connection specifically with the ability of VTB to decide to enter into the facility agreement, VTB, as an FSA regulated entity, had its own processes and procedures before lending moneys. The key figures at VTB in this process included (1) Konstantin Ryzhkov, who was VTB's Head of Acquisition and Leverage Finance from 1 September 2007 to 27 October 2008 and who was also a managing director at VTB

Moscow, (2) Marina Bragina, who held the equivalent post in VTB to that held by Mr Tulupov in VTB Moscow, (3) Steve Thunem, Head of Debt Capital Markets, (4) Juliet Wooi, a credit risk analyst, (5) Peter Yates, Head of Credit Risk, (6) Peter Manning, Chief Risk Officer, as per Board Approved Delegated Credit Approval Authorities and (7) K Ianovski, Head of Structured Finance and Syndication.

174. As regards the ownership of RAP, VTB relies upon two emails dated 6 and 8 November 2007 by Ms Bragina of VTB to others within VTB and VTB Moscow which recorded information from Nutritek or from Marcap Moscow. The first email states that RAP was incorporated on 21 May 2007 (in error written as 2002) as an SPV for a Nutritek dairy division acquisition and further states that RAP "has no other operations" and that RAP's beneficiary is a Mr Vladimir Alginin. The second email was in response to a list of questions put to Ms Bragina previously. The key passage states as follows, in the form of the question followed by the answer:

> "Confirm that [RAP] is 100% owned by Alginin. As per the info just received from Nutritek management, Mr Alginin has a 90% share [RAP], the remaining 10% share belongs to the management team."

175. As to the dairy companies, there was a valuation report produced by the Moscow office of Ernst & Young Valuation LLC ("E&Y"), valuing the dairy companies at US$366m. This report, which is dated 5 September 2007 and is in Russian, was received by Mr Tulupov on 8 November 2007 and was discussed in several conversations with Ms Bragina and Mr Ryzhkov. Based on Mr Tulupov's evidence, VTB's case is that it attached considerable importance to the report, as did VTB Moscow. By a document headed "Application for Credit Facilities", dated 13 November 2007, VTB approved the proposed transaction. It was signed on 16 November 2007 by Ms Bragina and Mr Thunem, both of VTB.

176. VTB took the decision to enter into a separate interest swap agreement ("the ISA"), by a further application for credit facilities, dated 15 November 2007, and signed by Juliet Wooi, Mr Yates and Mr Manning on 19 November 2007. Further particulars relating to VTB's case as to reliance on the information provided by Nutritek concerning the ostensibly arm's length relationship between Nutritek and RAP, and concerning the value of the dairy companies, are found in the witness statement of Mr Muraviev. The transaction was completed over the period 23 to 28 November 2007, during which period a number of agreements were entered into by the various parties.

177. The principal agreements entered into as part of the overall transaction were thus as follows: the facility agreement, between VTB and RAP, the SPA between RAP, Nutritek and Newblade dated 27 November 2007, the ISA between VTB and RAP dated 28 November 2007 and the participation agreement between VTB and VTB Moscow dated 28 November 2007 ("the participation agreement"). The key provisions of the facility agreement are set out by the Court of Appeal at Appendix 1 of its judgment. They included that its governing law is English law (clause 34) and that the courts of England and Wales have non-exclusive jurisdiction to settle any dispute arising out of, or in connection with the facility agreement, or, at VTB's option, arbitration in London (clauses 35.1.1 and 35.3). It was further expressly agreed in clause 35.1.2 that the courts of England and Wales were the most appropriate convenient courts to settle such disputes and that no party would argue otherwise (clause 35.1.2). The other agreements referred to above also contain both a choice of law clause in favour of English law, and a jurisdiction agreement in favour of the courts of England and Wales.

178. As stated above, both the judge and the Court of Appeal held that VTB had a good arguable case that it entered into the facility agreement in reliance on the two misrepresentations, the first relating to the representation that RAP and Nutritek were not under common control, and the second as to the value of the dairy companies.

179. On 28 November 2007, RAP's account with VTB in London was credited with US$208,700,000.00. This sum represented the "Tranche A" payment under the facility agreement. On the same day, US$195,000,000 of those monies were transferred to Nutritek's account with VTB in London, at RAP's direction. The monies were thereafter removed from Nutritek's account, so that by 7 December 2007 no funds remained in Nutritek's account with VTB in London. Some of the monies were transferred to various creditors of Nutritek, while at least US$62 million went to a Nutritek bank account in Switzerland. VTB says that it does not know where the funds went after that, and none of the respondents has put forward evidence as to where the funds went thereafter. As noted by the judge at para 54, some further moneys lent by VTB as part of Tranche B under the facility agreement were utilised to pay interest due under it. This involved the use of another BVI company Madinter Associates Ltd ("Madinter"), which enabled interest to be paid in respect of the principal loan until but not including the payment due in November 2008, since when no payment of interest or principal due under the facility agreement has been made.

180. VTB sent a first notice of default from its London office to RAP on 15 December 2008 and a second notice of default on 14 January 2009. From August 2009, VTB began to enforce its security. In due course, VTB took control over Newblade, Migifa and eventually RAP. VTB currently estimates the value of the

assets of the dairy companies as less than US$40m, and probably no more than US$32m.

VTB's claims

181. VTB's claims are concisely described by the judge at paras 57 to 63. It says that it was induced to enter into the facility agreement and the ISA, and to advance sums totalling US$225,050,000 to RAP, by two fraudulent misrepresentations. First, it claims that (together with VTB Moscow) it relied on representations made primarily by Nutritek to the effect that the SPA was a sale between companies that were under separate control. It contends that these representations were false and must have been known by Nutritek to be false when made. VTB knew at the time that Mr Malofeev through MarCap Moscow had de facto control of Nutritek. As the judge put it, what it says it did not know at the time, but has since discovered, is that Mr Malofeev through MarCap BVI also controlled RAP. Thus RAP and Nutritek were under common control at the date of the facility agreement and of the SPA and it was not therefore a commercial transaction carried on at arm's length. The judge held at para 59 that it was not necessary to go into detail concerning the basis of VTB's contention that Mr Malofeev ultimately controlled RAP as well as Nutritek, since it had not been the subject of challenge before him.

182. Secondly, VTB claims that both it and VTB Moscow relied upon the 2007 E&Y valuation of the dairy companies and that that valuation was based on false financial figures and unsupportable forecasts provided to E&Y by Nutritek. In this regard, VTB relies upon an opinion obtained from Deloitte LLP dated 11 April 2011, which analysed the figures provided by Nutritek to E&Y and compared them with the financial information provided by the dairy companies from their own accounting records, which represents the true trading position, as well as information from other sources. It is said that it is apparent from Deloitte's opinion that Nutritek very substantially overstated the true performance figures for the dairy companies. It is VTB's case that the extent of the overstatement is such that it could only have been deliberate.

183. The judge summarised the position in paras 61 and 62. The false representations are alleged to have been made principally by Nutritek. It is VTB's case that they were made pursuant to a conspiracy between a number of persons including MarCap BVI, MarCap Moscow and Mr Malofeev. Given the significant role they played in introducing the business opportunity to VTB and the conduct of the negotiations, VTB says that Mr Malofeev and MarCap Moscow were the prime movers in the conspiracy to deceive VTB.

184. In this part of the case VTB pleaded causes of action against the defendants in deceit and unlawful means conspiracy, the unlawful means being the fraudulent misrepresentations. In deceit, VTB's case against MarCap BVI, MarCap Moscow and Mr Malofeev is that they are jointly liable with Nutritek on the basis that the misrepresentations were made pursuant to a common design between them.

185. As stated in his judgment at para 144, before the judge the respondents accepted that, if English law is the applicable law, VTB has established that VTB has a real prospect of success in its claims for deceit and conspiracy and thus that there is a serious issue to be tried save in three specific respects as follows. The first, the no loss point, was that VTB had no real prospect of establishing that it had suffered loss as a result. The judge discussed the no loss point in considerable detail between paras 145 and 169. He rejected the respondents' case. The respondents reargued the no loss point in the Court of Appeal, again on the basis of English law. They again failed, for the reasons given in the judgment of the Court of Appeal at paras 107 to 121.

186. The second point was that VTB has no real prospect of establishing either that Marcap BVI was jointly liable in deceit or that it participated in the alleged conspiracy. The judge considered that submission between paras 170 and 176 and accepted it. However, the Court of Appeal held that he was wrong to do so for the reasons they gave at paras 122 to 127.

187. The third point was that VTB has no real prospect of establishing either that Mr Malofeev is jointly liable in respect of the deceit alleged or that he participated in the alleged conspiracy. The judge rejected that submission between paras 177 and 183. He therefore concluded that there was a serious issue to be tried between VTB and Mr Malofeev. The respondents did not reargue this point in the Court of Appeal.

188. In this court the respondents did not seek to reopen these issues. It follows that, if English law is the relevant law, VTB has a real prospect of succeeding against the respondents on the merits.

189. As summarised thus far, the position is that, at any rate on the basis that English law is the applicable law, VTB has established the first and second of the principles set out in para 164 above. There is a serious issue to be tried on the merits in the case of each of VTB's claims in tort and VTB has a good arguable case that it sustained damage within the jurisdiction within the meaning of paragraph 3.1(9)(a) of Practice Direction 6B, which is the relevant provision by reason of CPR 6.36. It follows that the remaining question is whether the third

principle is satisfied. I will consider that question under the heading *forum conveniens*.

Forum conveniens

190. As stated above, the question is whether VTB has satisfied the court that England is clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction on the basis that England is the proper place in which to bring the claim. As the Court of Appeal noted at para 101, on the basis of Lord Goff's classic speech in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, 475-484, the underlying principle is that, the task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice: *Sim v Robinow* (1892) 19 R 665, 668.

191. Only two *fora* have been canvassed in this case; they are England and Russia. Both the judge and the Court of Appeal held that VTB had failed to discharge the onus of proof and that the centre of gravity of the case was Russia and not England. I recognise of course that this is an interlocutory appeal, that a comparison between England and Russia involves a number of different considerations and that, in these circumstances, an appellate court should not interfere with a decision of a lower court unless satisfied that it has erred in principle. However, as appears below, it is my view that the Court of Appeal did make a number of errors of principle, which entitles, indeed requires, this court to reach its own independent conclusions.

192. There are a number of points that seem to me to be relevant on this part of the case. First, it appears to me that it is important for the court to know what issues are likely to arise at the trial of the action on the merits. Only when the issues are identified will it be possible to compare the two jurisdictions. This principle is now stated in *Dicey, Morris & Collins* on *The Conflict of Laws*, 15th ed (2012), para 11-143, in which, having stated the general principles much as above, the editors say that, in practice, the defendant should identify the issues which are appropriate to be tried in the foreign court. In the footnote to that sentence the editors referred to *Limit (No 3) Ltd v PDV Insurance Co* [2005] EWCA Civ 383, at para 73 and *Sawyer v Atari Interactive Inc* [2005] EWHC 2351 (Ch), [2006] ILPr 129, at para 54. See also *Islamic Republic of Pakistan v Zadari* [2006] EWHC 2411 (Comm), at para 138 and *Novus Aviation Ltd v Onur Air Tasimacilik AS* [2009] EWCA Civ 122. Lawrence Collins J or Lawrence Collins LJ is the author of the relevant passage in each of those cases except the *Limit (No 3)* case, in which I admit to being the author.

193. I adhere to the view I expressed in that case, now supported by *Dicey*. As Eder J put it in *Mujur Bakat Sdn Bhd v Uni Asia General Insurance Berhad* [2011] EWHC 643 (Comm), at para 9

> "… , in considering whether or not England is the most appropriate forum, it is necessary to have in mind the overall shape of any trial and, in particular what are, or what are at least likely to be, the issues between the parties and which will ultimately be required to be determined at any trial. These were originally set out in two letters …"

I stress that I do not mean that a defendant must set out his evidence in great detail, whether of foreign law or of fact. The purpose of the exercise is simply to state what the issues of fact are likely to be, so that the court can gauge whether England is clearly or distinctly the appropriate forum for the trial of the issues. This is of some importance in this case because no evidence was put before the court on the merits of the claims by or on behalf of Mr Malofeev. Moreover, Mr Hapgood QC submitted to the court in the course of the argument that Mr Malofeev was perfectly entitled to say and he does say to VTB, "You are accusing me of being a swindler, you get on and prove it." Mr Hapgood added that the matter proceeded in both courts below on the clear understanding that VTB will have to prove its case. As he put it, they will have to prove all five ingredients of a claim for fraudulent misrepresentation and a sixth ingredient in the case of conspiracy. It appears from what Mr Hapgood said that, at any rate at present, he has no positive case. It is of course true that a defendant in the position of Mr Malofeev is not bound to advance a positive case but, in the absence of a positive case, the focus of the court can only be on the ingredients of the claim. It should not speculate about the nature of any positive case that might be advanced in the future.

194. It was suggested in the course of the argument that the defendants could not plead a case or put forward a positive case because of the risk that they would submit to the jurisdiction. There is, in my opinion, no such risk. There is no reason why defendants should not put in a draft defence or evidence on the express basis that they are doing so without prejudice to their case on jurisdiction. I note in passing that it is the duty of the parties under CPR 1.3 to help the court to further the overriding objective, which is to deal with cases justly.

195. The second point is the question whether English law is the applicable law. It is common ground that the applicable law falls to be determined by the provisions of the Private International Law (Miscellaneous Provisions) Act 1995 ("the 1995 Act") and not by the European Parliament and Council Regulation 864/2007/EC on the law applicable to non-contractual regulations, known as the

Rome II Regulation. This is because the claims relate to damage which occurred after 20 August 2007 and before 11 January 2009.

196. Sections 11 and 12 of the 1995 Act provide, so far as relevant, as follows:

> "**Choice of applicable law: the general rule.**
>
> 11(1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.
>
> (2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being -
>
> …
>
> (c) … , the law of the country in which the most significant element or elements of those events occurred.
>
> …
>
> **Choice of applicable law: displacement of general rule.**
>
> 12(1) If it appears, in all the circumstances, from a comparison of -
>
> (a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and
>
> (b) the significance of any factors connecting the tort or delict with another country,
>
> that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.
>
> (2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events."

197. The judge discussed the question of applicable law between paras 119 and 143 and concluded that the applicable law was Russian law. He did so by reference to both section 11(2)(c) and section 12. In para 158 the Court of Appeal expressed

the tentative conclusion that, under section 11(2)(c), the applicable law was English law but also said that they were not convinced that VTB had "by far the better of the argument". They held however that, under section 12, it was substantially more appropriate for the applicable law for determining the issues concerned to be that of Russia. VTB says that both the judge and the Court of Appeal were wrong and that the applicable law is English law.

198. The question under section 11(2)(c) is in which country did the events constituting the tort occur. In para 148 the Court of Appeal set out six principles as reflecting the correct approach to section 11(2)(c) as follows:

> "(l) Section 11 of the I995 Act sets out the general rule for ascertaining the applicable law of a tort. It adopts a geographical approach to that question. (2) Where the elements of the events constituting the tort or delict occur in different countries and the cause of action relates to something other than personal injury or damage to property, then section 11(2)(c) requires an analysis of all the elements of the events constituting the tort in question. (3) In carrying out that exercise, it is the English law constituents of the tort that matter. (4) The analysis requires examination of the 'intrinsic nature' of the elements of the events constituting the tort. It does not, at this stage, involve an examination of the nature or closeness of any tie between the element and the country where that element was involved or took place. This latter exercise is only relevant if section 12 is invoked. (5) Once the different elements of the events and the country in which they occurred have been identified, the court has to make a 'value judgment' regarding the 'significance' of each of those 'elements'. 'Significance' means the significance of the element in relation to the tort in question, rather than trying to judge which involves the most elaborate factual investigation. (6) Under section 11(2)(c), (ie in relation to causes of action other than in respect of personal injury or damage to property where the elements of the events constituting the tort occur in different countries) the applicable law of the tort in question will be that of the country where the significance of one element or several elements of events outweighs or outweigh the significance of any element or elements found in any other country."

199. Those principles were derived from four cases: *Morin v Bonhams & Brooks Ltd* [2004] 1 Lloyd's Rep 702 (CA); *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2006] Lloyd's Rep IR 127 (Aikens J) and [2006] 2 Lloyd's Rep 475 (CA); *Trafigura Beheer BV v Kookmin Bank Co* [2006] 2 Lloyd's Rep 455 (Aikens J); and *Fiona Trust & Holding Corpn v Privalov* [2010] EWHC 3199 (Comm) (Andrew Smith J). In this court those propositions were rightly accepted as correct.

The Court of Appeal added at para 150, in relation both to section 11(2)(c) and to section 12, that two further and important points emerged from *Dornoch*. The first was that, if, as here, the exercise is being carried out at an interlocutory stage as part of an overall exercise to determine whether the English court should have jurisdiction to determine the claim in tort in question, the court cannot finally determine the applicable law of the tort. The second was that it is "quintessentially" for the judge to make an assessment of the significance of the elements of the events constituting the tort for the purposes of section 11(2)(c) and that the Court of Appeal would not interfere with that assessment unless it was satisfied that the judge made such an error in his assessment as to require the Court of Appeal to make its own assessment. It referred to the judgment of Tuckey LJ at paras 46 and 47, with which Sir Mark Potter P and May LJ agreed.

200. The Court of Appeal held at paras 154 to 157 that the judge had made such an error in the case of section 11(2)(c) and reached a different conclusion. In my opinion, if the principles set out above are applied, the Court of Appeal was entitled to interfere with the conclusion reached by the judge. As Mance LJ put it in *Morin* at para 21, section 11 directs attention to the "intrinsic nature of the element(s) of the tort". The Court of Appeal said at para 157 that they judged that the most important elements of the facts constituting the tort of deceit are, by their intrinsic nature, the reliance on the misrepresentations by VTB and the loss suffered by VTB. I agree.

201. The events constituting the tort of deceit are indeed the making of the misrepresentations which were known to be untrue, reliance on the misrepresentations and the loss sustained as a result. All those occurred in England. The misrepresentations were made to VTB in England, VTB relied upon them in England and incurred its loss in England. In my opinion that is plain. It is true in the case of both misrepresentations: even though the dairy representations were initially made in Russia, the critical representations which induced VTB to enter into the facility agreement were made in London and relied upon in London. As to the alleged conspiracy, the essence of the case is that the representations were made as part of a common design. To my mind, it does not matter for the purposes of section 11(2)(c) because the essence of VTB's case remains based upon the representations made to it in London and relied upon in London by VTB entering into the facility agreement, together with the loss sustained in London.

202. In *Dornoch* Aikens J was concerned with alleged misrepresentations in a proposal form. The proposal form was completed in Mauritius and given to brokers in Mauritius and then sent to London, where it was presented to reinsurers. Aikens J held that the representation contained in the proposal form was made in Mauritius and London. The presentation to the reinsurers was made and relied upon in London. Aikens J held at para 106 that the intention that the reinsurers should rely upon the proposal form continued to operate in London and the

reliance, which he regarded as the most significant element, took place in London. The position is the same here. The reliance by entering into the facility agreement took place in London. Para 107 is also of some assistance. Aikens J said:

> "The antecedent facts concerning the true situation in MCB are important, but it is what is done with those facts that really matters so far as the tort of fraudulent misrepresentation or deceit is concerned. In short, it is (on the assumptions I have made) MCB's decision not to tell the facts as they are and to continue to mislead that matters most, not the true facts themselves."

In these circumstances there was in my opinion no room for a tentative conclusion that English law is the applicable law under the general rule set out in section 11. It is plainly the applicable law under the general rule.

203. I turn to section 12. At para 149 the Court of Appeal identified these further four principles:

> "(7) The exercise to be conducted under section 12 is carried out after the court has determined the significance of the factors which connect a tort or delict to the country whose law would therefore be the applicable law under the general rule. (8) At this stage there has to be a comparison between the significance of those factors with the significance of any factors connecting the tort or delict with any other country. The question is whether, on that comparison, it is 'substantially more appropriate' for the applicable law to be the law of the other country so as to displace the applicable law as determined under the 'general rule'. (9) The factors which may be taken into account as connecting a tort or delict with a country other than that determined as being the country of the applicable law under the general rule are potentially much wider than the 'elements of the events constituting the tort' in section 11. They can include factors relating to the parties' connections with another country, the connections with another country of any of the events which constitute the tort or delict in question or the connection with another country of any of the circumstances or consequences of those events which constitute the tort or delict. (10) In particular the factors can include (a) a pre-existing relationship of the parties, whether contractual or otherwise; (b) any applicable law expressly or impliedly chosen by the parties to apply to that relationship, and (c) whether the pre-existing relationship is connected with the events which constitute the relevant tort or delict."

204. In every case to which the 1995 Act applies in which the court has considered the general rule under section 11, the court must consider whether the general rule is displaced under section 12. There is an illuminating discussion of the general approach in para 35-148 of the 15th edition of *Dicey*. The editors say that the application of the displacement rule in section 12 first requires, taking account of all the circumstances, a comparison of the significance of the factors which connect the *tort* with the country the law of which would be applicable under the general rule (in this case English law) and the significance of any factors connecting the *tort* with another country (here Russia). The word *tort* is italicised in the text in *Dicey*. The editors say that secondly, it then has to be asked, in the light of the comparison, whether it is "substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues," to be the law of that other country.

205. The editors note that the general rule has been displaced on very few occasions. They further observe that, although section 12 applies in all cases to which section 11 applies, it would seem that the case for displacement is likely to be most difficult to establish in the case of section 11(2)(c) because the application of that provision itself requires the court to identify the country in which the most significant element or elements of the tort are located. Importantly they stress the use of the word "substantially", which they describe as the key word, and conclude that the general rule should not be dislodged easily, lest it be emasculated. The party seeking to displace the law which applies under section 11 must show a clear preponderance of factors declared relevant by section 12(2) which point to the law of the other country.

206. That approach is borne out by the cases. The idea that "substantially" was the key word was derived from the judgment of Waller LJ in *Roerig v Valiant Trawlers Ltd* [2002] EWCA Civ 21, [2002] 1 WLR 2304, at para 12(v). The principles were considered in more detail by Brooke LJ in *R (Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327, [2007] QB 621 at paras 103 and 104, where he noted that the 1995 Act derived from a report of the Law Commission, from which he quoted. He added that Lord Wilberforce, who was a member of the House of Lords Committee which considered the Bill, had expressed the view that it would be a "very rare case" in which the general rule under section 11 would be displaced: "Prima facie there has to be a strong case".

207. In para 163 the Court of Appeal concluded that, if the applicable law was English law under the general rule in section 11(2)(c), the factors relied upon by the judge in his paras 188 and 189 led them to the conclusion that English law was displaced by Russian law by section 12. In paras 188 and 189, the judge had said this:

> "188. Counsel for the defendants submitted that the following factors pointed to Russia being the natural forum. First, the connections of the parties to Russia. VTB is controlled by VTB Moscow, which is Russian. Furthermore, the litigation is being managed by VTBDC, which is also Russian. MarCap Moscow and Mr Malofeev are Russian. It is common ground that Nutritek was managed from Russia, and VTB's case is that Mr Malofeev controls both Nutritek and MarCap BVI. Furthermore, it is VTB's case that Mr Malofeev orchestrated the fraud, primarily through MarCap Moscow.
>
> 189. Secondly, the connections of the events constituting the torts to Russia. The transaction was introduced to VTB Moscow at meetings between Russian individuals in Russia. The negotiations mainly took place in Russia. The misrepresentations were made and mainly received in Russia. The more important misrepresentation concerned the performance of the Dairy Companies, which are Russian companies. The 2007 E&Y Valuation was a valuation by Ernst & Young's Moscow office and was based on information provided by Nutritek's Russian management. The misrepresentations were primarily relied upon by VTB Moscow acting through its Credit Committee and Management Board in Russia. It was VTB Moscow and VTBDC which primarily dealt with RAP's default and enforcing the security. The secured assets were in Russia. The discovery of the fraud took place in Russia. Although the loss was sustained by VTB in England, as discussed above the ultimate economic impact is in Russia."

208. The Court of Appeal recognised in para 163 that they had concluded at para 154 that the judge did not appear to have taken account of the fact that the representations were passed on to or confirmed to VTB in London, that VTB had its own procedures that had to be completed satisfactorily before it could enter into the facility agreement and that, although there was an "economic impact" on VTB Moscow, VTB suffered loss as soon as the transfer of funds by it to RAP was made in London. Notwithstanding those conclusions, the Court of Appeal reached these conclusions at para 163:

> "… in our view the factors identified in the judgment at paras 188 and 189, even after discounting the point about primary reliance on the representations in Russia and the securities being in Russia, are of considerable significance. On the material that is before us, taking all those factors into account we have concluded that the centre of gravity of these torts lies in Russia. Therefore, for present purposes,

> we have decided that a comparison of the significance of the section 11(2)(c) factors, assuming that they would lead to the applicable law being English, with the significance of the other factors connecting the torts with Russia, leads to the conclusion that it is substantially more appropriate for the applicable law for determining the issues concerning the torts to be that of Russia."

209. It seems to me that in that paragraph the Court of Appeal did not pay sufficient regard to the fact that in his paras 188 and 189 the judge was not considering section 12 of the 1995 Act but the broader question of *forum conveniens.* Further, the Court of Appeal focused, not upon the particular tort or torts but upon much wider considerations. As *Dicey* observes, section 12(1) expressly focuses upon the particular torts. Here the tort or torts as a result of which VTB suffered loss in London were committed as a result of VTB entering into a contract or contracts in London in reliance upon representations made to it in London. I entirely accept that some of the other considerations were capable of being relevant under section 12(2), but I can see no basis upon which it can properly be held that the general rule, under which English law was plainly the applicable law, should be displaced by Russian law on the basis that it is "substantially more appropriate for the applicable law for determining the issues" to be the law of Russia. In short, the claimant here is an English entity which was induced to enter into the facility agreement in England and suffered loss in England when it discharged its obligations under it. The position would no doubt have been entirely different if the claimant had been VTB Moscow.

210. For these reasons, I would hold that the Court of Appeal erred in principle in concluding that the applicable law was Russian law, that under the general rule in section 11(2)(c) of the 1995 Act the applicable law was English law and that the general rule was not displaced in favour of Russian law by section 12.

211. I turn to consider what significance the conclusions that (a) the torts were committed in England and (b) the applicable law is English law have on the question whether England is "the proper place in which to bring the claim". As stated above, this involves asking whether England is clearly or distinctly the appropriate forum for the trial of the dispute or (which amounts to the same thing) the forum in which the case can be most suitably tried for the interests of all the parties and for the ends of justice.

212. In my opinion neither consideration is conclusive but, together with the terms of the facility agreement, they afford strong grounds for concluding that the answer to those questions is in the affirmative. It was submitted by Mr Howard QC on behalf of VTB that there is a presumption that that is the case where, in a tort case, the tort is committed within the jurisdiction. In my opinion, that is to put it

too high. It is undoubtedly a relevant factor but how strong a factor will depend upon the circumstances. It is true that courts have sometimes used the expression presumption. On the other hand they sometimes talk in terms of a prima facie case. Yet other expressions have been used. For example, in *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 the alleged tort was a negligent failure to warn a pregnant woman of the dangers of taking a drug which contained thalidomide. The tort was committed in New South Wales, where the plaintiff had bought the drug. In the Privy Council, Lord Pearson said at p 468 that it was "manifestly just and reasonable that a defendant should have to answer for his wrongdoing in the country where he did the wrong". As in all the cases, the particular phrase chosen depended upon all the circumstances of the case.

213. In *The Albaforth* [1984] 2 Lloyd's Rep 91, which was much discussed in the course of the argument, the claim was for damages for negligent misrepresentation contained in a telex received and acted upon in England. Ackner LJ said that the jurisdiction in which a tort has been committed is prima facie the natural forum for the determination of the dispute. The other member of the Court of Appeal was Robert Goff LJ. It is of some significance in the present case that he quoted with approval a statement by Lord Denning MR in *Diamond v Bank of London and Montreal* [1979] QB 333 at 346 to the effect that the tort of negligent misrepresentation was committed at the place where the representation was received and acted upon. Robert Goff LJ did not then use the expression "prima facie forum" but said at p 96 that the cases showed that, where the jurisdiction of the court is based on the fact that the tort was committed within the jurisdiction, that court, "having jurisdiction, is the most appropriate court to try the claim, where it is manifestly just and reasonable that the defendant should answer for his wrongdoing". He added that, that being so, it was not easy to see what other facts could displace the conclusion that the courts of that jurisdiction are the natural forum. That is to my mind so even if significant parts of the evidence derive from elsewhere.

214. *Berezovsky v Michaels* [2000] 1 WLR 1004 was a libel case in which an internationally disseminated libel had been published in England. Lord Steyn, giving the principal judgment for the majority in the House of Lords, who were himself, Lord Nolan and Lord Hobhouse, quoted (at p 1013) the two passages from *The Albaforth* set out above and referred to *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458, 468E per Lord Pearson, *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 in the Court of Appeal (subsequently overruled in *Lonrho plc v Fayed* [1992] 1 AC 448 on other aspects of the case) and *Schapira v Ahronson* [1999] EMLR 735. Lord Steyn added that the implied supposition in these cases was that the substance of the tort arose within the jurisdiction. He added at p 1014D-E:

> "Counsel accepted that he could not object to a proposition that the place where in substance the tort arises is a weighty factor pointing to that jurisdiction being the appropriate one. This illustrates the weakness of the argument. The distinction between a prima facie position and treating the same factor as a weighty circumstance pointing in the same direction is a rather fine one. For my part the *Albaforth* line of authority is well established, tried and tested, and unobjectionable in principle. I would hold that Hirst LJ correctly relied on these decisions."

215. The Court of Appeal considered this issue at paras 140 to 144. They expressly referred to the statements of principle in *The Albaforth*, noting that neither Ackner nor Robert Goff LJJ referred to a presumption. They then referred to the statements of Lord Steyn in *Berezovsky v Michaels* noted above, adding that, although Lord Hope dissented (as did Lord Hoffmann), he agreed with the reasons given by Lord Steyn for accepting that Hirst LJ was right to rely on *The Albaforth* line of authority. They further noted that Lord Hope said at p 103 that he would reject the argument that the application of the *Spiliada* test did not admit of the application in that case of the principle that the jurisdiction in which the tort is committed is prima facie the natural forum for the dispute.

216. The Court of Appeal concluded at para 144 that the most that could be extracted from the House of Lords decision in *Berezovsky* was that, where a tort is committed within the jurisdiction, that jurisdiction is prima facie the natural forum for the resolution of claims arising from it. However they added two points to which they attached importance. The first was that it had not been stated that this principle applies where the loss is sustained in the jurisdiction but other elements of the tort occur elsewhere. The second was that the statements made in the *Berezovsky* case can only describe, at best, a prima facie position, and that they cannot detract from the overall test which has to be applied, namely that permission to serve out of the jurisdiction will only be granted if the claimant demonstrates that England is clearly or distinctly the appropriate forum for the resolution of the dispute. They concluded that there is no presumption in favour of England being either the natural or the appropriate forum in this case.

217. I agree with the Court of Appeal that the cases do not go so far as to say that there is such a presumption but they do recognise that it is likely to be a strong or weighty factor: see further paras 231 to 232 below. While it is true that the principle in *The Albaforth* has not been expressly stated to apply where the loss is sustained in the jurisdiction but other elements of the tort occur elsewhere, the application of the principle in that very case was in respect of the tort of negligent misrepresentation which was held to be committed in England as the place where the representation was received and acted upon. The same is true of the alleged fraudulent representations here.

218. The second factor which seems to me to be of **real** significance is that, for the reasons set out above, the applicable law under the 1995 Act is English law. It is not in dispute that it is a potentially relevant factor. The correct approach was, as ever, encapsulated by Lord Goff in *Spiliada* at p 481H:

> "… the importance to be attached to any particular ground [of RSC Ord 11, r 1(1)] invoked by the plaintiff may vary from case to case. For example, the fact that English law is the putative proper law of the contract may be of very great importance (as in *BP Exploration Co (Libya) Ltd v Hun*t [1976] 1 WLR 788, where, in my opinion, Kerr J rightly granted leave to serve proceedings on the defendant out of the jurisdiction); or it may be of little importance as seen in the context of the whole case."

See also *Dicey*, 15th ed, para 12-034.

219. The significance of the conclusion that English law is the applicable law is that it is generally appropriate for a claim in tort governed by English law to be adjudicated upon by an English court. The same would of course be true *mutatis mutandis* if the claim in tort were governed by Russian law. In that case the natural court to determine liability would be a Russian court. It was no doubt for that reason that the defendants have throughout persisted in arguing that the applicable law is Russian law. In the instant case, it is not clear what, if any, role Russian law might play at a trial. It seems most unlikely to play a role if the action proceeds in England. Although I recognise that it would be open to the defendants to reopen the issue of applicable law for determination at trial, it is difficult to imagine circumstances in which they would have a real prospect of persuading a judge to reach a different conclusion from that arrived at in this court. If the action proceeds in Russia it is possible that Russian law will play a role because the respondents have reserved their right to rely upon Russian law but, since they have given no indication as to the nature of the case they might wish to run, it is not possible to express a view as to its possible effect on a trial in Russia. In these circumstances it seems to me that, given that VTB has shown that the applicable law of the tort is English law and that the respondents have asserted no positive case to the contrary even if the action were to proceed in Russia, this is a strong factor in favour of England as the natural forum.

220. A further important factor is, as I see it, the fact that the facility agreement which, on VTB's case, it was induced to enter into, contained, not only clause 34, which provided that the agreement was governed by English law, but also clause 35.1, which provided that the courts of England had non-exclusive jurisdiction to settle any dispute arising out of the agreement, that the English courts were the most appropriate and convenient to settle the disputes, that no party would argue to

the contrary and that the clause was for the benefit of VTB alone. Clause 35.3 also gave VTB the right to refer a dispute to arbitration in London.

221. The fact that those clauses were included in the agreement which, on VTB's case, it was fraudulently induced to enter into, seems to me to be a strong pointer to the conclusion that the natural forum for the resolution of the dispute is England. If VTB had not enforced its security by acquiring RAP, it would have been able to sue RAP in England and to add the present respondents as necessary or proper parties to the action against RAP. I appreciate that the respondents are not parties to the facility agreement and that it is therefore said that these clauses are irrelevant. However, VTB's submission derives support from Professor Briggs' recent article entitled "The subtle variety of jurisdiction agreements", [2012] LMCLQ 364, in which he discusses the Court of Appeal decision in the present case (at pp 370-371):

> "In *VTB Capital plc v Nutritek International Corpn* … it appears to have been accepted without substantial argument that if the hidden person were not a party to the substantive contract containing the jurisdiction clause he could not be affected by a jurisdiction agreement contained in that contract. This conclusion, with respect, should not be accepted without further reflection. For even if the lifting of the veil does not allow a contractual claim, otherwise lying against the company, to be made against the veiled person, there may be other bases for seeking to establish his personal liability. Fraud will be the most likely one … That being so, the question becomes whether the jurisdiction clause in the company's contract may be utilised to establish or sustain jurisdiction against the alleged fraudster. This is a question which requires more of an answer than a simple assertion that a jurisdiction agreement is only ever effective in relation to a contracting party. For one thing, the jurisdiction clause is separable from the substantive contract, and the absence of a contractual claim against the fraudulent defendant need not entail the irrelevance of a jurisdiction agreement which he engineered. For another … even if he is not *contractually* bound to the jurisdiction, it should not be challenging to contend that the court which he signed his company up to, in circumstances of fraud, is also the proper place in which to assert any available claim of substantive liability against him."

222. I agree with Professor Briggs. In particular I agree with him that it is significant that where a person fraudulently engineers a contract, not only subject to English law but also subject to an English jurisdiction clause, the proper (or natural) place in which to assert a claim for substantive liability against him,

whether in contract or tort, is England. The same would of course be true mutatis mutandis if the agreed law and jurisdiction were that of another state.

223. Mr Howard's submission on behalf of VTB is that the principal grounds for concluding that England is the natural forum for this action are therefore these. Although a significant number of preliminary events occurred in Russia, the critical ingredients of all the torts took place in England. In particular, the representations were made to VTB in England, where they were intended to be relied upon because it was VTB that was intended to enter into the facility agreement, which was governed by English law and contained an English jurisdiction clause. VTB did enter into the agreement and, pursuant to its terms large sums of money were drawn down and, as the judge and the Court of Appeal held, VTB suffered its loss in England. As explained above, it is substantially for these reasons that English law is the law applicable to the torts. In these circumstances, England is clearly or distinctly the appropriate forum for the trial of the dispute. I would accept those submissions.

224. The judge and the Court of Appeal rejected that approach on the basis that the centre of gravity of the torts lies in Russia. They did so on the basis of the evidence that there was considerable activity in Moscow before VTB was chosen as the lender. It is said that all the evidence referable to that period would be in Russia. There is some force in that but the difficulty facing the respondents is that they have not identified what classes of evidence they might wish to adduce about what. It is therefore appropriate, as counsel for the respondents himself indicated, to approach the case on the basis that VTB will be put to proof of its claims.

225. The nature of VTB's claims is summarised in paras 181 to 184 above. VTB hopes to be able to call Ms Bragina and others from VTB, although it is right to say that Ms Bragina has left VTB and it is no longer in contact with her. There is some documentary evidence available in London and Moscow. I see no difficulty in any of the VTB witnesses who are now in Moscow or elsewhere coming to London to give evidence. The evidence will no doubt focus on the alleged representations. As to the allegation that it was represented that Nutritek and RAP were not under common control, there is evidence in the emails referred to in para 174 above. It is not known whether it is said on behalf of the respondents that no such representations were made or, if they were made, by whom they were made (and with whose knowledge and on whose behalf) and whether they were true. Since the respondents have not indicated the nature of their case, it is not known what evidence they might wish to adduce on this part of the case. For example, it is not known whether Mr Malofeev accepts that he controlled both Nutritek and RAP as alleged, although (as stated at para 170 above), the judge found that the allegation that RAP was ultimately owned and controlled by Mr Malofeev through a web of offshore companies had not been the subject of challenge by him. Mr Malofeev is an international business man who is said to control a series of

offshore companies. There is no evidence that either he or any other witness could not readily come to London. It may equally be said that there is no reason why any witness could not go to Moscow.

226. So, on the first alleged misrepresentation, there seems to me to be no reason to depart from the view expressed earlier, namely that the natural forum for the resolution of the issues is England. The same is true of the second alleged representation. The issues may essentially be whether the facts relating to the dairy companies were fairly given to E&Y in Moscow. Much of the information is no doubt in Russian and, if detailed evidence is required, it may be in Russia. However, Deloittes LLP in London have made a report in English on which VTB relies dated 11 April 2011, which analysed the figures provided by Nutritek to E&Y and compared them with the financial information provided by the dairy companies from their own accounting records, which represent the true trading position, as well as information from other sources. It is said that it is apparent from Deloitte's opinion that Nutritek very substantially overstated the true performance figures for the dairy companies. It is VTB's case that the extent of the overstatement is such that it could only have been deliberate. It seems likely to me that any issues under this head could be determined in England or Russia.

227. In all the circumstances, given that VTB is the claimant and not VTB Moscow, I do not agree with the Court of Appeal that the centre of gravity of the torts is in Russia. I would hold that VTB has shown that England is clearly or distinctly the appropriate forum for the reasons summarised in para 223 above. I would therefore allow the appeal on the *forum non conveniens* point.

228. I would only add this in the light of the judgments of Lord Mance and Lord Neuberger which I have seen since I prepared my own draft. Subject to the general point that one of the underlying principles of the CPR is that the parties should co-operate with each other and the court in order that cases are resolved justly, which must surely include the necessity for each party to put his cards on the table, I do not disagree with the general points made by Lord Neuberger in the early parts of his judgment. None of the points I have made above is inconsistent with them. Thus, as I see it, even if the burden of proof is on the claimant, the defendant must indicate, at least in general terms what positive case he wishes to advance at a future trial, whether in England or elsewhere. This should be done shortly and concisely. In the instant case no attempt was made to do it at all.

229. I entirely agree with Lord Neuberger that, where a judge has made no error of principle and the only challenge that can be advanced against his or her decision depends upon persuading an appellate court to balance the various factors differently, an appellate court should not interfere unless the balance struck by the judge can be shown to be plainly wrong. The question is whether this is such a

case or whether this is a case in which, as VTB says, both the judge and the Court of Appeal made errors of principle and that, permission to appeal to this Court having been granted, it becomes its responsibility to strike the balance. In my opinion, this case is in the second category.

230. As to the position before the judge, the Court of Appeal held that he had wrongly approached the question as a two stage question. However I agree with Lord Mance and Lord Neuberger that, even if he did, he ultimately posed the correct question. The position as to choice of law is different. The judge erred in law in concluding that Russian law was the applicable law by reference to both section 11(2)(c) and section 12 of the 1995 Act. The Court of Appeal correctly held that he was wrong under section 11(2)(c) but it too was wrong in so far as it held that the applicable law was Russian law under section 12. In my opinion, as discussed in paras 195 to 210 above, those were errors of principle. Moreover, as explained in para 219, they were significant errors, as evidenced by the importance attached to the applicable law point by both sides. Both sides naturally took the view that whichever was the applicable law provided a strong pointer to the *forum conveniens*. As Lord Mance puts it at para 46, it is generally preferable, other things being equal, that a case should be tried in the country whose law applies.

231. There are to my mind two other important respects in which the courts below failed to apply the correct principles. They are the correct approach to the significance of, first, the place where the tort was committed and, secondly, the fact that the facility agreement contained an English jurisdiction clause. As to the first, it is only fair to the judge to note that VTB did not refer to *The Albaforth* or the other cases following it which I have discussed in paras 212 to 217 above. Although there is reference in the cases to the proposition that the place of the tort is *prima facie* the natural forum and although of course (as ever) all depends upon the circumstances, in the passage quoted from *The Albaforth* at para 213 above, Robert Goff LJ expressed the view that, where the jurisdiction of the court was based on the fact that the tort was committed within the jurisdiction, that court was the most appropriate court to try the claim on the basis that it was manifestly just and reasonable that the defendant should answer there for his wrongdoing. Robert Goff LJ there echoed (at p 96) the expression used by Lord Pearson in the *Distillers* case at p 468: see para 212 above. Finally, as I read the speech of Lord Steyn in *Berezovsky* (quoted at para 214 above), the majority of the House of Lords approved the proposition that there is no real distinction between treating the place of the tort as a prima facie pointer and treating it as a weighty factor.

232. It is in my opinion a weighty factor here, where the alleged representations (if made) were deliberate acts which were committed within the jurisdiction, which were intended to be relied upon within the jurisdiction, which were in fact relied upon within the jurisdiction and which caused VTB to sustain loss within the

jurisdiction. I stress again that this is a claim by VTB and not by VTB Moscow and VTB is not suing upon a tort committed in Moscow.

233. Albeit for understandable reasons, this point was not considered by the judge. It follows, as I see it, that he did not take it into account, even in the alternative, in carrying out the balancing exercise. In the Court of Appeal the effect of the authorities was in my judgment down played. It is not to my mind a fair conclusion based on the authorities that the statements made in *Berezovsky* can "only describe, at best, a *prima facie* position", at any rate unless one keeps well in mind the reasoning of Lord Goff and Lord Pearson referred to above. Although it is fair to say that the Court of Appeal did refer to the passage from the speech of Lord Steyn in *Berezovsky* quoted above, there is no hint that they treated this consideration as a weighty factor. For the reasons I have given they should have done so.

234. The second respect in which in my opinion the courts below erred in principle relates to the relevance of the English jurisdiction agreement in the facility agreement. The judge merely said in para 187 that the English jurisdiction and arbitration clauses are a pointer to England but not a strong one, given that the claim is a tort claim not a contract claim. He does not explain why the fact that the claim is a tort claim leads to the conclusion that the pointer to England is not a strong one. He does not address the force of the submissions made on behalf of VTB. For the reasons given in paras 220 to 212 above, this is in my opinion a strong factor, on the basis that, as Professor Briggs observed, where a person fraudulently engineers a contract, not only subject to English law but also subject to an English jurisdiction clause, the proper (or natural) place in which to assert a claim for substantive liability against him, whether in contract or tort, is England.

235. The Court of Appeal did not expressly address this point. Lord Neuberger says that they must have agreed with the judge. That may be so but, given that the judge gave no reasons for his view, it seems to me to be of little assistance to the respondents. With respect to him, Lord Neuberger does not as I see it address this way of putting the case, which is much narrower than that addressed by Lord Neuberger in paras 105 and 106. In so far as he does address the point, I strongly prefer the opinion of Professor Briggs.

236. In all the circumstances I remain of the view that both the judge and the Court of Appeal erred in principle in more than one respect, that it is now for this Court to reach its own conclusion on the question whether England is clearly or distinctly the appropriate forum for the trial of the dispute or (which amounts to the same thing) the forum in which the case can be most suitably tried for the interests of all the parties and for the ends of justice. For the reasons I have given, my conclusion is that it is.

237. In so far as it is suggested by Lord Neuberger and Lord Wilson that this approach is to assume what VTB has to prove, namely that Mr Malofeev was guilty of deceit, I respectfully disagree. The approach I favour does not assume that VTB will succeed but is based upon the fact that it has been held that VTB has at least a good arguable case on each of these factors: (1) the tort alleged was committed in England; (2) English law is the applicable law under the 1995 Act; (3) the respondents made fraudulent representations which induced VTB to enter into the facility agreement which is not only subject to English law but also subject to an English jurisdiction clause; and (4) the loss sustained as a result of lending money in England pursuant to the facility agreement was incurred in England. In all these circumstances England is clearly and distinctly the proper (or natural) place in which to assert a claim for damages for fraudulent representation against the respondents. I recognise that, as pointed out by Lord Mance there are many factors which connect the underlying dispute with Russia but many of them are evidential and, indeed, many of them treat the claim as if it were a claim by VTB Moscow or the VTB Group, which it is not. As Lord Wilson observes, the defendant's points primarily go to practicality, but it seems to me that a trial could perfectly well take place in England or Russia but that England is the natural forum for the reasons I have given. In all the circumstances I would allow the appeal on the *forum non conveniens* point.

Piercing the corporate veil

238. I agree with Lord Neuberger that this is not a case in which it would be appropriate to pierce the corporate veil on the facts. I would however wish to reserve for future decision the question what is the true scope of the circumstances in which it is permissible to pierce the corporate veil. That includes the question whether *Antonio Gramsci Shipping Corpn v Stepanovs* [2011] EWHC 333 (Comm), [2011] 1 Lloyd's Rep 647 was correctly decided.

The WFO

239. Since the appeal is to be dismissed, I agree with Lord Neuberger that the discharged freezing order should remain discharged and that the temporary WFO should be discharged as well.

LORD REED (dissenting)

240. In relation to the first question in this appeal, namely whether the permission granted ex parte to VTB to serve the proceedings out of the jurisdiction should be set aside, I have reached the same conclusion as Lord Clarke. I do not

question the general points made by Lord Neuberger at paragraphs 79 to 93 of his judgment. Nevertheless, it appears to me that the courts below erred in law in their approach to this question. In particular, as explained by Lord Clarke, they erred (i) in concluding that the applicable law was Russian law rather than English law and (ii) in failing to attach appropriate weight to the fact that the alleged tort was committed in England, in accordance with the line of authority including *The Albaforth* [1984] 2 Lloyd's Rep 91 and *Berezovsky v Michaels* [2000] 1 WLR 1004.

241. These errors, particularly when considered cumulatively, appear to me to have been material. I recognise that the Court of Appeal stated (para 166) that, even if it had concluded that the applicable law was English law, this would not have been a factor that would weigh heavily, "precisely because if the defendants wished to allege and plead that the applicable law was Russian law, both sides would have had to prepare for a trial on that basis". The fact of the matter is however that the defendants have not pleaded, or indicated any intention to plead, that the applicable law is Russian law. Since the approach of the courts below was flawed in principle, it appears to me that this court has no alternative but to reconsider the question on a proper basis.

242. Having done so, I have reached the same conclusion as Lord Clarke, essentially for the reasons stated at paragraphs 223 to 227 of his judgment.

243. In relation to the second question, namely whether VTB should be allowed to amend its statement of case so as to add a claim of damages for breach of contract, based upon "piercing the corporate veil", I agree that permission should be refused, for the reasons given by Lord Neuberger.

244. Since the appeal is being dismissed, I also agree that the discharged freezing order should remain discharged, and that the temporary freezing order should also be discharged.